86-287

No.

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,

Appellants,

v.

LAPIDUS POPCORN, INC.,

Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

BAKER & MCKENZIE
JUAN G. COLLAS, JR.
JONATHAN S. KITCHEN
Counsel of Record
580 California Street,
Suite 500
San Francisco, CA 94104
Telephone: (415) 576-3000
Counsel for Appellants Granex Corporation, U.S.A. and Pan-Pacific Commodities

PILLSBURY, MADISON & SUTRO
JAMES F. KIRKHAM
WALTER R. ALLAN
Counsel of Record
225 Bush Street
Post Office Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Counsel for Appellant Crown Oil Corporation

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the 1978 amendment to California's Cartwright Act, California Business and Professions Code sections 16700 *et seq.*, to the extent it allows antitrust claims by indirect purchasers for price-fixed overcharge damages, is unconstitutional under (1) the Supremacy Clause or (2) the Due Process Clause of the United States Constitution.

DESIGNATION OF CORPORATE RELATIONSHIPS

1. *Crown Oil Corporation*

Crown Oil Corporation, filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Crown Oil Corporation has no parent company and does not have ownership interest in any subsidiaries.

2. *Granex Corporation, U.S.A.*

Granex Corporation, U.S.A., filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

On February 23, 1982, Granex Corporation, U.S.A., then a Delaware corporation, entered into an agreement pursuant to which it merged with Pan-Pacific Commodities, then a California corporation. Pan-Pacific Commodities was the surviving corporation, but the name of the surviving corporation after that merger was changed to and has remained Granex Corporation, U.S.A. which has, at all times since the merger, been a validly existing California corporation.

At present, the parent company of Granex Corporation, U.S.A. is United Coconut Oil Mills, Inc., a Philippine corporation. Granex Corporation, U.S.A. does not have ownership interest in any subsidiaries.

3. *Pan-Pacific Commodities*

Pan-Pacific Commodities, filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

On February 23, 1982, Pan-Pacific Commodities entered into an agreement pursuant to which it merged with Granex Corporation, U.S.A. Pan-Pacific Commodities was the surviving corporation but survived under the name Granex Corporation, U.S.A. and has, at all times since the merger, been a validly existing California corporation under that name.

Pan-Pacific Commodities no longer has any separate legal status and, accordingly, has no parent company and does not have ownership interest in any subsidiaries.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT UNDER SUPREME COURT RULE 28.4(c)	4
STATEMENT OF THE CASE	4
1. Background	4
2. This Proceeding	5
3. How The Federal Questions Were Raised	6
THE FEDERAL QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION	7
1. The Validity Of State Indirect Purchaser Antitrust Claims Is At Issue In This Appeal. This Court's Precedent, Policy And Sound Logic Compel The Conclusion That The California Courts Erred In Holding California's Indirect Purchaser Statute Constitutional	7
A. California Law Permits Multiple Liability Forbidden By Federal Law	8
B. California Law Frustrates Enforcement Of The Federal Law	10
C. California Law Violates Due Process By Giving Claims To Indirect Purchasers For Price-Fixed Overcharges	12
2. Resolution Of The Indirect Purchaser Issue Is Of Great Practical Importance To The Administration Of Justice	13
CONCLUSION	15

APPENDIX

TABLE OF CONTENTS

Page

Opinion, dated February 14, 1986, issued by the Court of Appeal of the State of California, First Appellate District, Division Two 1

Order overruling defendants' demurrer to plaintiff's complaint, filed May 9, 1985, issued by the Superior Court of the State of California for the City and County of San Francisco 12

Order (denying petition for writ of mandate) filed June 26, 1985, issued by the Court of Appeal of the State of California, First Appellate District, Division Two 15

Order granting review after judgment by the Court of Appeal, filed August 21, 1985, issued by the Supreme Court of the State of California 16

Order (denying petition for rehearing) filed March 13, 1986, issued by the Court of Appeal of the State of California, First Appellate District, Division Two 17

Order denying review after judgment by the Court of Appeal, filed May 22, 1986, issued by the Supreme Court of the State of California 18

Modification, filed June 2, 1986, issued by the Supreme Court of the State of California 19

Notice of appeal to the Supreme Court of the United States, filed August 5, 1986, with the Court of Appeal of the State of California, First Appellate District, Division Two 20

TABLE OF AUTHORITIES

Cases

Page

Alton Box Bd. Co. v. Esprit De Corp., 682 F.2d 1267, 1272 (9th Cir. 1982) 9

Associated General Contractors, Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 543-544 (1983) 11, 12

Boutte v. Chevron Oil Co., 316 F. Supp. 524, 530 (E.D.La. 1970), *affirmed per curiam*, 442 F.2d 1337 (5th Cir. 1971) 12

Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481 (1968) 5

Cities Service Co. v. McGrath, 342 U.S. 330, 335-36 (1952) 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479, 482-483 (1975) 7

Flynt v. Ohio, 451 U.S. 619, 621, 622 (1981) 7

Hanover Shoe v. United Shoe Mach., 392 U.S. 481, 494 (1968) 8

Illinois Brick v. Illinois, 431 U.S. 720, 730, 730-731, 731 n.11, 745, 745-746, 746-747, 763-764 (1977) 2, 4, 5, 7, 8, 9, 10, 11, 14, 15

In Re Chicken Antitrust Litigation, Etc., 669 F.2d 228, 235, 238 (5th Cir. 1982) 10, 11

In Re Wiring Devices Antitrust Litigation, 498 F. Supp. 79, 88 (E.D.N.Y. 1980) 12, 13

Mailand v. Burckle, 20 Cal. 3d 367, 376, 143 Cal. Rptr. 1, 572 P.2d 1142 (1978) 5

Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976) 5

Russo & Dublin v. Allied Maintenance Corp., 407 N.Y.S.2d 617, 620 (1978) 12

Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15, 20, 201 Cal. Rptr. 580, 679 P.2d 14 (1984) 5, 8

Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 80 (1961) 12

TABLE OF AUTHORITIES

United States Constitution

Page

Article VI, Clause 2 (Supremacy Clause) 3, 13

Fourteenth Amendment, Section 1 (Due Process Clause) 2, 3, 6, 12, 13

Statutes

15 U.S.C. § 1 (Sherman Act) 4

15 U.S.C. § 15 (Clayton Act) 6

28 U.S.C. § 1257(2) 3, 7

28 U.S.C. § 1407 14

28 U.S.C. § 2103 15

28 U.S.C. § 2403(b) 4

Ala. Code § 6-5-60(a) (1975) 13

California Business and Professions Code §§ 16700 *et seq.* (Cartwright Act) 3, 4, 5, 6, 8, 9, 13

California Business and Professions Code § 16750(a) 2, 3, 4

D.C. Code Ann. § 28-4509 (1981) 13

Haw. Rev. Stat. § 480-14(c) (amended 1980) 13

Ill. Ann. Stat. Ch. 38, § 60-7(2) (amended 1979) 13

Md. Ann. Code § 11-209 (amended 1982) 13

Miss. Code Ann. § 75-21-9 (1972) 14

N.M. Stat. Ann. § 57-1-3(A) (amended 1979) 14

S.D. Codified Laws Ann. § 37-1-33 (amended 1980) 14

Wis. Stat. Ann. § 133.18(1) (amended 1980) 14

Other Authorities

Bureau of National Affairs, *Corporate Counsel Weekly*, vol. 1, No. 23, p. 1 (June 11, 1986) 10

Peninsula Times Tribune, February 19, 1986, p. D-4 14

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,

Appellants,

v.

LAPIDUS POPCORN, INC.,

Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

INTRODUCTION

Appellants Crown Oil Corporation, Granex Corporation, U.S.A., and Pan-Pacific Commodities (referred to collectively as "appellants") have settled two separate federal antitrust actions relating to their sales of Philippine coconut oil in the United States, one brought by the United States government and a second by a class of all direct purchasers of that Philippine coconut oil. Settlement of this second action, which claimed the full amount of an alleged price-fixed overcharge, resulted in the creation of a fund for distribution among the plaintiff direct purchasers valued in the millions of dollars.

Having defended against and settled not one, but two federal antitrust complaints, appellants believed that the alleged over-

charge issue had finally been put to rest. To the contrary, however, plaintiff here, purportedly on behalf of a class of indirect purchasers, brought suit in California state court to recover damages for that portion of the alleged overcharge plaintiff claims was passed on to the class by the direct purchasers.

A final decision of the California Court of Appeal in this action holds that, despite this Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the California law providing for such indirect purchaser suits is not preempted by federal law and does not violate the Due Process Clause of the United States Constitution. This appeal followed.

OPINIONS BELOW

The order of the California Superior Court overruling appellants' demurrer to the complaint, dated May 9, 1985 (Appendix, pp. 12-14), is unreported. The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two, dated February 14, 1986, denying appellants' petition for review of that order (Appendix, pp. 1-11), is reported at 177 Cal. App. 3d 604, 223 Cal. Rptr. 164. The initial order of the Supreme Court of the State of California denying review, filed May 22, 1986, and its "corrected" order denying review, filed June 2, 1986 (Appendix, pp. 18, 19), are unreported.

JURISDICTION

This appeal challenges the constitutionality of a state statute (California Business and Professions Code section 16750(a), as amended in 1978) which permits indirect purchasers to maintain antitrust causes of action in state court for recovery of alleged price-fixed overcharge damages passed on to them by direct purchasers. Appellants contend that the California statute, as amended, is preempted by the federal antitrust laws and that it violates the Due Process Clause of the Fourteenth Amendment.

The order of the California Superior Court ruling that the California statute is constitutional was filed on May 9, 1985. Appendix, pp. 12-14. The opinion of the California Court of Appeal holding that there is no preemption and no violation of

due process was filed on February 14, 1986. Appendix, pp. 1-11. Its order denying rehearing was filed on March 13, 1986. Appendix, p. 17. The order of the California Supreme Court denying review was filed on May 22, 1986 (Appendix, p. 18), and its "corrected" order denying review (Appendix, p. 19) was filed on June 2, 1986. A Notice of Appeal to this Court was filed with the California Court of Appeal on August 5, 1986. Appendix, pp. 20-21.

This appeal is being docketed in this Court within ninety days of the California Supreme Court's denial of appellants' petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Clause 2 of Article VI of the Constitution of the United States of America provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California's Cartwright Act, California Business and Professions Code sections 16700, *et seq.*, provided at section 16750(a) prior to its amendment in 1978, as follows:

> Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in

> the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

The 1978 amendment added the words:

> Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

STATEMENT UNDER SUPREME COURT RULE 28.4(c)

Since the proceeding draws into question the constitutionality of California Business and Professions Code section 16750(a) (as amended in 1978), and because the Attorney General of the State of California is not a party to this proceeding, it is noted that 28 U.S.C. section 2403(b) may be applicable.

STATEMENT OF THE CASE

1. Background

In 1977, this Court, in *Illinois Brick v. Illinois*, held that indirect purchasers have no claims for price-fixed overcharge damages under federal antitrust law and thus may not maintain treble damage actions under Section 1 of the Sherman Act, 15 U.S.C. § 1. The Court based its decision, in part, on the serious risk of multiple liability that such actions would create and its conclusion that "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed part of it." 431 U.S. at 745-746.

In 1978, the California Legislature amended the Cartwright Act, California's antitrust law (Cal. Bus. & Prof. Code, §§ 16700,

et seq.), to provide that California indirect purchasers could state claims for price-fixed overcharge damages. As the California Supreme Court observed in *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 20, 201 Cal. Rptr. 580, 679 P.2d 14 (1984), and as was noted in the California Court of Appeal's opinion in this action, the express purpose of the 1978 amendment was to provide that this Court's holding in *Illinois Brick* does not apply in actions under the state antitrust law.[1]

2. This Proceeding

In 1981, following a federal grand jury investigation conducted by the Department of Justice, the United States filed a civil action against appellants, alleging that they had conspired to fix the price of coconut oil.[2] That action was settled and was disposed of by the entry of a consent judgment.

Immediately following the filing of the government action, several private federal class actions also were filed against appellants, asserting claims under the federal antitrust laws on behalf of every person who made direct purchases from appellants during the alleged price-fixed period. Those direct purchaser actions were consolidated as *In Re Coconut Oil Antitrust Litigation*,

---

[1] Prior to this amendment, the California Supreme Court consistently had held that the Cartwright Act, in its entirety, was to be construed consistently with the federal antitrust law on which it was based. *Mailand v. Burckle*, 20 Cal. 3d 367, 376, 143 Cal. Rptr. 1, 527 P.2d 1142 (1978); *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976); *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481 (1968).

[2] In 1979, the Philippine government "rationalized" the coconut oil industry, in part by requiring joint marketing at a single price of most Philippine bulk coconut oil sold in the United States and elsewhere worldwide. The Justice Department never claimed that the Philippines could not lawfully so organize its domestic industry. The Justice Department did take the position, however, that certain United States corporations, including the appellants herein, which marketed Philippine coconut oil, were drawn into the Philippine pricing organization in violation of federal antitrust law.

MDL 474 (N.D. Cal. 1981). In due course, the claims of all such direct purchasers were settled, which settlement was approved by the United States District Court for the Northern District of California. An agreed final judgment was entered in *In Re Coconut Oil Antitrust Litigation* on July 1, 1983.

Thereafter. in 1984, appellee Lapidus Popcorn, Inc., an indirect purchaser of coconut oil, brought this action against appellants in California state court under the 1978 amendment to the Cartwright Act. Appellee alleged that at least some portion of the overcharge created by the alleged conspiracy was passed on to California indirect purchasers, and it brought the action on behalf of a class of all California businesses that had purchased coconut oil indirectly from appellants.

3. How The Federal Questions Were Raised

Appellants demurred to the complaint on the ground that the 1978 amendment to the Cartwright Act is unconstitutional because (1) it is preempted by federal law and (2) it violates the Fourteenth Amendment. The Superior Court overruled that demurrer finding that: (a) the United States Congress has not expressed, by unambiguous language, an intention to preempt California's indirect purchaser provision; (b) that provision does not conflict with federal antitrust law; and (c) the indirect purchaser damage provision does not stand as an obstacle to accomplishment of the full purposes and objectives of Section 4 of the Clayton Act (15 U.S.C. § 15). Appendix, pp. 13-14.

Appellants then filed a petition for writ of mandate in the Court of Appeal of the State of California. That petition was denied on June 26, 1985 (Appendix, p. 15), but by order dated August 21, 1985, the California Supreme Court granted appellants' petition for review and transferred the matter back to the Court of Appeal with directions that it be heard on the merits. Appendix, p. 16.

Upon review on the merits, the California Court of Appeal held that the 1978 amendment to the Cartwright Act was not unconstitutional, in that federal law does not preempt the state statute permitting indirect purchaser claims and that such claims do not violate the Due Process Clause of the Fourteenth Amendment. Appendix, pp. 1-11. The California Supreme Court, with three

justices voting for review (Justices Grodin, Lucas and Panelli), declined to hear the case, thus rejecting the precise constitutional positions urged here. Appendix, p. 18. This appeal followed.[3]

THE FEDERAL QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

1. The Validity Of State Indirect Purchaser Antitrust Claims Is At Issue In This Appeal. This Court's Precedent, Policy And Sound Logic Compel The Conclusion That The California Courts Erred In Holding California's Indirect Purchaser Statute Constitutional.

The validity of state laws giving indirect purchasers antitrust claims is unresolved. This appeal presents that issue with precision and clarity and, as the following factors show, it is thus particularly appropriate for plenary disposition:

(a) The California Legislature's express intent in enacting the 1978 amendment was to avoid the application of this Court's holding in *Illinois Brick* to indirect purchasers in California. The

---

[3] For purposes of 28 U.S.C. section 1257(2), the ruling below falls within two of four categories of "final" judgments discussed by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and *Flynt v. Ohio*, 451 U.S. 619 (1981).

First, it is a "final judgment on the federal issue for purposes of state-court proceedings." *Flynt, supra*, 451 U.S. at 621; and *see Cox Broadcasting Corp., supra*, 420 U.S. at 479. There are no other federal issues involved, and thus "no probability of piecemeal review with respect to federal issues." *Flynt, supra*, 451 U.S. at 621.

Second, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting Corp., supra*, 420 U.S. at 482-483. The additional criterion mentioned in *Flynt* is also met, *i.e.*, the case involves "identifiable federal statutory or constitutional policies which would [be] undermined by the continuation of the litigation in the state courts." *Flynt, supra*, 451 U.S. at 622. As discussed herein, this case involves a direct assault upon the important federal policies recognized in this Court's decision in *Illinois Brick v. Illinois*.

1978 amendment "incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick*." *Union Carbide Corp., supra*, 36 Cal. 3d at 20. Accordingly, the conflict between the state and the federal rule is unambiguous and unqualified.

(b) The factual context in which the legal issue arises likewise presents the competing considerations unambiguously and in classic form: A federal class action on behalf of all direct purchasers of a price-fixed commodity, during the entire term of the conspiracy, claiming the entire amount of the overcharge (trebled); a disposition of the entire claim by settlement; followed by an indirect purchaser action in state court to recover overcharge damages which they claim were passed on to them.

(c) The opinion of the California court squarely attacks and rejects this Court's reasoning and holding in *Illinois Brick*, asserting that it is this Court's decision itself "which frustrates Congress'-purpose in creating the treble-damages action." Appendix, p. 9.

A. California Law Permits Multiple Liability Forbidden By Federal Law.

Federal antitrust law prohibits both multiple liability and *the risk* of multiple liability. *Illinois Brick v. Illinois*, 431 U.S. 720, 730-731 (1977). In *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968), this Court determined that the passing-on of an alleged price-fixed overcharge to indirect purchasers is no defense to a claim by direct purchasers for the full amount of that overcharge. 392 U.S. at 494. In *Illinois Brick*, this Court went on to state that "[a] one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudication and therefore of unwarranted multiple liability for the defendant." *Illinois Brick, supra*, 431 U.S. at 730.

The prohibition against multiple liability is fundamental to the Court's decision. Observing that the use of procedural devices such as consolidation and statutory interpleader "cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely (and as occurred here . . .)," this Court declared:

> [P]roponents of this approach ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for the injured party to go uncompensated . . . ('a little slopover on the shoulders of the wrongdoers . . . is acceptable'). *We do not find this risk acceptable.* 431 U.S. at 731, n. 11 (emphasis added).[4]

As the Court of Appeals for the Ninth Circuit has also recognized, indirect purchaser suits such as the one presented here create "the risk that [a] state suit [by indirect purchasers] may result in the 'duplicative recoveries' condemned by the Supreme Court." *Alton Box Bd. Co. v. Esprit De Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982).

Nonetheless, the California Court of Appeal refused to find that the state law was preempted, and it was completely candid in its reasons for doing so. It held that this Court was plainly wrong, stating that: "[I]t is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action." Appendix, p. 9.

The California Court of Appeal further asserted that it is the 1978 amendment to the Cartwright Act, and not the decision in *Illinois Brick*, that "comports with Congress' express intent." Appendix, p. 9. Reasoning that the federal suits involving appellants resulted in settlements and that the issue of damages was never adjudicated, the California Court of Appeal claimed that "[t]he potential for multiple liability in the present case is sheer speculation." Appendix, p. 10. But that conception is based upon the erroneous premise that settling defendants should be treated differently from defendants subject to adverse judgments, a proposition specifically rejected by this Court in *Illinois Brick*. *See* 431 U.S. at 731, n. 11.

---

[4] The risk in the case at bar is more extreme than the usual circumstance. Indeed, this case fits within one of the situations which even the dissent in *Illinois Brick* recognized as risking multiple recovery: "where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment." 431 U.S. at 763-764.

The California Court of Appeal concluded by holding that, because in its view *Illinois Brick* was based upon a "judicially economic rationale," and not a correct determination of Congressional intent, it did not constitute "an adequate basis for a preemption argument." Appendix, p. 9. The California court thus set itself above this Court as the supreme arbiter of Congressional intent.[5]

B. California Law Frustrates Enforcement Of The Federal Law.

Although indirect purchaser suits under California law are prosecuted in state, not federal, courts, such indirect purchaser suits nonetheless frustrate the enforcement of federal treble damage actions. Quite apart from the issue of multiple liability, those indirect purchaser suits impede settlement, reduce the amount available to direct purchasers, and reintroduce the complexity of pass-on calculations that *Illinois Brick* prohibited.

Federal law recognizes "the strong judicial policy favoring settlements." *In Re Chicken Antitrust Litigation, Etc.*, 669 F.2d 228, 238 (5th Cir. 1982). However, if indirect purchasers are allowed to assert state antitrust claims, then those claims must be taken into account in settlement of a federal action. Recognizing that defendants rightfully insist upon "total peace" in settlement negotiations, the Fifth Circuit Court of Appeals responded to objections by direct purchasers to the inclusion of indirect purchasers in the allocation of settlement funds, as follows:

> Defendants' insistence upon obtaining a complete release from all significant potential plaintiffs necessarily meant that no settlement would have been reached unless indirect purchasers released their claims against defendants. This, in

---

[5] The correctness of this Court's determination of the intent of Congress is further demonstrated by the fact that, in the nine years following *Illinois Brick*, at least eight separate bills have been introduced to change its effect. None has passed. Most recently, on June 5, 1986 a bill to allow suits by indirect purchasers in certain limited instances was defeated in the Senate Judiciary Committee. Bureau of National Affairs, *Corporate Counsel Weekly*, vol. 1, No. 23, p. 1, (June 11, 1986).

> turn, meant that *indirect purchasers had the power to frustrate any settlement* and unless those classes primarily composed of indirect purchasers also received a share of the settlement proceeds, there would have been no settlement. 669 F.2d at 238 (emphasis added).

Thus, the presence of indirect purchaser claims obstructs federal policy encouraging settlement in at least two ways. First, where there exists the possibility that indirect purchaser claims may be made, defendants necessarily must be significantly less motivated to accept a settlement which does not include such claims. Second, it is significantly more difficult to achieve such a settlement where "indirect purchasers ha[ve] the power to frustrate any settlement." *Ibid.*

Moreover, in *Illinois Brick*, this Court held that consideration of indirect purchaser claims would seriously undermine the effectiveness of federal treble damage actions by transforming them into massive administrative efforts to apportion recovery among all potential plaintiffs, adding intolerable complexity to the resolution of such actions. In the words of this Court:

> The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement. 431 U.S. at 745.

Necessarily, the inclusion of indirect purchaser claims in federal settlements will require federal courts to consider pass-on allocations, since "no overall settlement can be adjudged fair or unfair unless the allocation scheme is also examined." *In Re Chicken, supra*, 669 F.2d at 235. Thus, if state indirect purchaser claims are allowed, the federal courts will be burdened in settlement proceedings with consideration of numerous pass-on allocation issues, including pass-ons among indirect purchasers in state court actions. In addition, if direct purchasers are required to share settlement funds with indirect purchasers, the amount of money available to them will be depleted, contrary to the federal policy announced in *Illinois Brick*. *See* 431 U.S. at 746-747.

This Court reviewed all of the relevant factors, in a different context, in *Associated General Contractors, Inc. v. Calif. State*

Council of Carpenters, 459 U.S. 519 (1983). The Court stated that:

> The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits. These cases have stressed the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other.
>
> We observed that potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs. 459 U.S. at 543-544.

C. California Law Violates Due Process By Giving Claims To Indirect Purchasers For Price-Fixed Overcharges.

The risk of multiple liability for a single wrong also violates due process. *See Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961) (the risk that Western Union might be forced to pay a single debt of unclaimed money from money orders to more than one state would violate the Due Process Clause of the Fourteenth Amendment).[6] In rejecting indirect purchaser claims under New York's antitrust laws, the court in *Russo & Dubin v. Allied Maintenance Corp.*, 407 N.Y.S.2d 617, 620 (1978), held that the allowance of indirect purchaser suits "would subject defendants to multiple liability in derogation of due process." In *In Re Wiring Devices Antitrust Litigation*, 498 F. Supp. 79, 88 (E.D.N.Y. 1980), the court noted that its holding, that South Carolina's state law did not allow indirect purchaser suits, permitted it to avoid the "serious questions which would otherwise have

---

[6] *See also Cities Service Co. v. McGrath*, 342 U.S. 330, 335-36 (1952) (Fifth Amendment protects "against double liability"); *Boutte v. Chevron Oil Co.*, 316 F. Supp. 524, 530 (E.D.La. 1970), *affirmed per curiam*, 442 F.2d 1337 (5th Cir. 1971) (judgment exposing defendant to the risk of paying royalties twice would violate due process).

to be faced under the Supremacy, Due Process and Commerce Clauses of the Federal Constitution." The due process infirmity is squarely presented by the California statute.

2. Resolution Of The Indirect Purchaser Issue Is Of Great Practical Importance To The Administration Of Justice.

As of July 8, 1985, no fewer than thirteen indirect purchaser complaints had been filed in California alone since enactment of the 1978 amendment to the Cartwright Act.[7] Furthermore, each such case is simply one of a number of potential indirect purchaser actions that might be brought against these same appellants in state courts in other jurisdictions based on the same alleged conspiracy. At least nine other states have statutes allowing public or private indirect purchaser suits,[8] and numerous

---

[7] *Esprit De Corp. v. Alton Box Bd. Co.*, S.F. Superior Court, No. 750975 (related to Corrugated Container Antitrust Litigation); *Villmar Dental Studio, Inc., et al. v. Union Carbide Corp., et al.*, S.F. Superior Court, No. 776005 (related to Industrial Gas Antitrust Litigation); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc., et al.*, S.F. Superior Court, No. 813271 (Glass Container Industry); *Pate v. Boise Cascade Corp.*, S.F. Superior Court, No. 765742 (related to Fine Paper Antitrust Litigation); *Greenberg v. Leviton Manufacturing Company, Inc.*, S.F. Superior Court, No. 759734 (related to Wiring Devices Antitrust Litigation); *Goldberg v. CPC International, Inc., et al.*, S.F. Superior Court, No. 765217 (related to Corn Derivatives Antitrust Litigation); *State of California v. California Hawaiian Sugar Co., et al.*, and *Brinker v. Amalgamated Sugar Co., et al.*, S.F. Superior Court, *see* 588 F.2d 1270 (9th Cir. 1978) (related to Sugar Antitrust Litigation); *Louie v. Cuisinarts, Inc.*, S.F. Superior Court, No. 881943 and *Gayer v. Cuisinarts, Inc.*, San Diego Superior Court, No. 458970 (related to Cuisinart Food Processor Antitrust Litigation); *Busy Boy Markets, Inc., et al. v. Roblin Industries, Inc.*, Civil Action No. 772-241 (shopping carts); *Retail Clerks Union, Local 648 v. Exxon Corp.*, MDL 150 WPG (gasoline); *Classic Remodeling and Renovation et al. v. Amtel, Inc.*, S.F. Superior Court, No. 786-832 (screws); *Alexander v. Cambridge Lee Industries, Inc.*, S.F. Superior Court, No. 831249 (copper tubing).

[8] Ala. Code § 6-5-60(a) (1975); D.C. Code Ann. § 28-4509 (1981); Haw. Rev. Stat. § 480-14(c) (amended 1980); Ill. Ann. Stat. Ch. 38, § 60-7(2) (amended 1979); Md. Ann. Code § 11-209 (amended 1982);

other states have ambiguous laws which could be interpreted to permit such suits. Thus, there is a substantial potential for a large number of state indirect purchaser actions, all based on the same alleged wrongdoing by the same defendants, all seeking recovery against the same alleged overcharge fund, and all requiring assessment and supervision in any settlement of a federal direct purchaser action.

In the federal system, federal direct purchaser claims filed in different districts in different states can be transferred to one court for joint proceedings under 28 U.S.C. section 1407. Because of the very nature of the independent sovereignties of the states, however, actions in different state courts cannot be joined. Thus, procedural devices to avoid the problems of indirect purchaser claims are even less workable in state indirect purchaser actions than they would be in federal indirect purchaser actions. Moreover, this Court in *Illinois Brick* found "not . . . acceptable" the risk of multiple liability that remained despite the use of available federal procedural devices. 431 U.S. at 731, n. 11.

The importance of the issue presented here is not limited to private civil litigants. Assistant Attorney General Thomas Dove, head of the Antitrust Division in the Department of Justice of the State of California, recently declared:

> It's [the California Court of Appeal's decision in this case] going to be extraordinarily significant . . . We're talking billions of dollars, a billion in California alone. Peninsula Times Tribune, February 19, 1986, p. D-4.

Similarly, the California Attorney General as *Amicus Curiae* stated in a brief filed in state court in this action that:

> The California Attorney General is vitally interested in the issue raised by [appellants'] petition. In addition to being empowered to bring criminal antitrust actions, the California Attorney General may sue for injunction, penalties and damages on behalf of consumers, as well as state and local

---

Miss. Code Ann. § 75-21-9 (1972); N.M. Stat. Ann. § 57-1-3(A) (amended 1979); S.D. Codified Laws Ann. § 37-1-33 (amended 1980); Wis. Stat. Ann. § 133.18(1) (amended 1980).

governmental entities hurt directly or indirectly by antitrust violations. Memorandum of the California Attorney General as *Amicus Curiae* in Opposition to Petition for Writ of Mandate, pp. 1-2.

The interests expressed by California's Attorney General are undoubtedly echoed by attorneys general in at least those nine jurisdictions which have indirect purchaser statutes. The same issue will undoubtedly arise in those states, if it has not already arisen. By this appeal, the Court has the opportunity to resolve the preemption issue, not only with respect to existing lawsuits in California, but for all jurisdictions which have antitrust statutes permitting indirect purchasers to maintain actions for price-fixed overcharge damages contrary to the federal law laid down by this Court in *Illinois Brick v. Illinois.*

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should note probable jurisdiction of this appeal and hear plenary argument of the issue presented. In the alternative, review should be granted under 28 U.S.C. section 2103.

Dated: August 19, 1986.

BAKER & MCKENZIE
JUAN G. COLLAS, JR.
JONATHAN S. KITCHEN
Counsel of Record
Attorneys for Appellants
Granex Corporation, U.S.A.
and Pan-Pacific Commodities

PILLSBURY, MADISON & SUTRO
JAMES F. KIRKHAM
WALTER R. ALLAN
Counsel of Record
Attorneys for Appellant
Crown Oil Corporation

Appendix

In the Court of Appeal of the State of California
First Appellate District
Division Two
A031735
(San Francisco Super.Ct.No. 829235)

Certified for Publication

Crown Oil Corporation et al.,
Petitioners,
v.
Superior Court of State of California,
for the City and County of San Francisco,
Respondent,
Lapidus Popcorn, Inc.,
Real Party in Interest.

OPINION
[Filed Feb. 14, 1986]

Petitioners Crown Oil Corporation, Granex Corporation, U.S.A., and Pan Pacific Commodities (hereafter defendants) seek review of the trial court's order overruling their demurrer to a complaint filed by real party in interest Lapidus Popcorn, Inc. (hereafter plaintiff) on behalf of a class of indirect purchasers of coconut oil from defendants. Initially, this court denied the petition without opinion, after which the California Supreme Court directed us to issue an alternative writ with respect to the petition.

Plaintiff filed suit against defendants alleging violations of California's Cartwright Antitrust Act (Cartwright Act) and Unfair Practices Act. (Bus. & Prof. Code, §§ 16700 et seq., 17000 et seq.)[1] The action was brought on behalf of a class of California businesses which purchased coconut oil indirectly from defendants. Specifically alleging violations of sections 16720 and 17200,

---

[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

the complaint prayed for treble damages in accordance with section 16750, subdivision (a).

Defendants demurred to the complaint on the grounds, inter alia, that the 1978 amendment to the Cartwright Act (Stats. 1978, ch. 536, § 1, p. 1693), to the extent that it authorizes indirect purchasers to sue for treble damages for price-fixing overcharges, is in conflict with and frustrates federal law which prohibits such indirect purchaser recovery. Accordingly, defendants maintained that the amendment is preempted by federal law under the Supremacy Clause. (U. S. Const., art. VI, cl. 2.)[2]

The trial court overruled the demurrer, finding "1. The State law does not conflict with the federal law; [¶] 2. Congress has not expressed, by unambiguous language, an intention to preempt; and [¶] 3. The State law does not stand as an obstacle to the accomplishment of the full purposes and objectives of the Clayton Act." We agree and affirm the order.

I. BACKGROUND

In 1890, the United States Congress enacted the Sherman Act (15 U.S.C. §§ 1-7) which prohibits trade restraints and monopolistic practices that affect interstate and/or foreign commerce.

---

[2] In their points and authorities in support of the demurrer, defendants stated that several complaints, alleging the identical wrongdoing, had been filed in federal district courts on behalf of all direct purchasers of coconut oil against the same named defendants. These federal actions, brought pursuant to sections 1 and 2 of the Sherman Antitrust Act (Sherman Act) (15 U.S.C. §§ 1, 2) and sections 4 and 16 of the Clayton Antitrust Act (Clayton Act) (15 U.S.C. §§ 15, 26), were subsequently consolidated and transferred to the United States District Court for the Northern District of California. (*In re Coconut Oil Antitrust Litigation MDL 474.*) On July 1, 1983, an agreed final judgment was entered in the federal action in accordance with a settlement agreement. The settlement terms included an agreement by defendants to pay the plaintiffs $2 million in cash and to distribute to the plaintiffs class coupons evidencing credits for 40,241,448 pounds of crude and refined coconut oil which were valued for settlement purposes at $10 million.

Thereafter, in 1914, Congress passed section 4 of the Clayton Act (15 U.S.C. § 15) and created a private right of action for persons injured by antitrust violations. The California Legislature codified this state's common law against trade restraints by enacting the Cartwright Act in 1941. (§ 16700 et seq.) The Cartwright Act provided a private right of action to any person "injured in his business or property." Thus, for more than 40 years both federal and state law have provided protection for persons injured by antitrust violations.

In 1968, the United States Supreme Court was called upon to resolve a conflict in the United States circuit courts as to whether an antitrust defendant could raise a "pass-on" defense. In *Hanover Shoe v. United Shoe Mach.* (1968) 392 U.S. 481, the plaintiff, a shoe manufacturer, sued the defendant shoe machinery manufacturer, claiming that the defendant's practice of leasing rather than selling its machinery had monopolized the shoe machinery industry in violation of section 2 of the Sherman Act. The plaintiff alleged injury to his business resulting from the leasing practice, because its costs were higher than they would have been if the defendant had been willing to sell the machinery outright. The defendant asserted a "pass-on" defense, alleging that the plaintiff was not injured by the overcharge because it was passed on to its customers further down the chain of distribution in the form of higher prices.

The Supreme Court rejected this defense and held that "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." (*Hanover Shoe v. United Shoe Mach., supra,* 392 U.S. 481, 489.) The court reasoned that there would be insurmountable difficulties in tracing the overcharge through the chain of distribution and the ultimate consumers would have little interest in bringing a class action because of the insignificant monetary injuries they sustained. The court concluded that if direct purchasers were not allowed to sue for the portion of the overcharge passed on to indirect purchasers, antitrust violators would profit by their illegal acts since nobody would bring suit against them. (*Id.,* at pp. 492-494.) Although

Hanover Shoe prohibited the defensive use of the "pass-on" doctrine, it left unanswered the question of whether the "pass-on" theory could be used offensively by indirect consumers.

This question was answered in the negative in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720. The plaintiffs in *Illinois Brick*, the State of Illinois and 700 local governmental entities, filed suit against the defendant concrete block manufacturers, charging a price-fixing conspiracy in violation of section 1 of the Sherman Act. The defendants allegedly fixed the price of concrete blocks which they sold to masonry contractors. The masonry contractors, acting as subcontractors for the masonry portions of construction projects, in turn sold to general contractors. The general contractors finally sold the buildings to the plaintiffs. The defendants moved for partial summary judgment against all of the plaintiffs that were indirect purchasers of concrete block, contending that as a matter of law only direct purchasers could sue for the alleged overcharge.

The Supreme Court agreed. Seeking symmetry with its holding in *Hanover Shoe*, the court stated that "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." (*Illinois Brick Co. v. Illinois, supra*, 431 U.S. 720, 728.) The court stated two reasons for its decision. First, allowing offensive but not defensive use of the "pass-on" doctrine would create a substantial risk of multiple liability for defendants. (*Id.*, at p. 730.) Second, "the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution." (*Id.*, at p. 732.)

In California, reaction to the *Illinois Brick* decision was immediate. In 1978, the California Legislature added the following paragraph to section 16750, subdivision (a): "Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly*

or indirectly with the defendant." (Emphasis added.)[3] As the California Supreme Court subsequently observed, "California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick*[4] [citation] that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution." (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 20.)

It is against this backdrop that we consider defendants' contention that the 1978 amendment to the Cartwright Act is preempted by federal law.

II. PREEMPTION

"It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. [Citation.] Absent explicit pre-emptive language, Congress' in-

---

[3] A similar response occurred in other jurisdictions. (See, e.g., Hawaii Rev. Stats., § 480-14(c); Ill. Ann. Stats., ch. 38, § 60-7(2); N.M. Stats. Ann., § 57-1-3(a); Wis. Stats. Ann., § 133.18(1); D.C. Code Ann., § 28-45091; Md. Code Ann., § 11-209; S.D. Laws Ann., § 7-1-33.) Alabama and Mississippi already had statutes allowing indirect-purchaser recovery. (See Ala. Code, § 6-5-60(a); Miss. Code Ann., § 75-21-9.)

[4] The dissent viewed the majority opinion as a regrettable retreat from prior cases which extended recovery to all persons who are made victims of the forbidden practice. (See *Mandeville Farms v. Sugar Co.* (1948) 334 U.S. 219, 236.) Justice Brennan declared that the decision frustrated Congress' plainly stated objective to provide a remedy to all persons injured by violations of the antitrust laws. The dissent draws attention to the then recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 15c et seq.) which gave state Attorneys General a cause of action to sue as *parens patraie* on behalf of citizens against antitrust violators and reasoned that the act confirmed Congress' intent to provide redress to all injured persons. (*Illinois Brick Co. v. Illinois, supra*, 431 U. S. 720, 748-765.) In a separate dissenting opinion, Justice Blackmun stated that had *Hanover Shoe* not been " 'on the books,' " he was positive that possibly a unanimous court would have ruled in favor of the plaintiffs. (*Id.*, at p. 765.)

tent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," . . . ' [Citations.] Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]" (*Pacific Gas & Elec. v. Energy Resources Comm'n* (1983) 461 U.S. 190, 203-204; see also *Silkwood v. Kerr-McGee Corp.* (1984) ___ U.S. ___ [___ L.Ed.2d ___, 104 S.Ct. 615, 621].)

Defendants concede that Congress has not completely displaced state regulation in the area of antitrust. (See *R. E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653, 660.) However, they contend that a specific provision of state law may nonetheless by preempted where, as here, it stands in square opposition to the federal rule that indirect purchasers may not claim price-fixed overcharges.

Defendants' first and strongest argument in favor of preemption is that California law permits multiple liability. They reason that damages caused by antitrust violations result in a "single overcharge" which is placed in a "common fund." (See *Blue Shield of Virginia v. McCready* (1982) 457 U.S. 465, 474; *Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 737.) They claim that if recovery from the common fund is limited to direct purchasers under federal law, a second fund for indirect consumers created by state law creates the risk of duplicative recoveries, a practice frowned upon by the *Illinois Brick* court. (*Id.,* at p. 731, fn. 11.) While this court, like the United States Supreme Court, is troubled by the threat of multiple liability, we find defendants' agrument unpersuasive with respect to the issue of preemption.

Preliminarily, we note that where, as in the case of antitrust regulation, Congress has not expressed its intent to preempt state authority, the proper approach to a preemption analysis is to reconcile "the operation of both statutory schemes with one

another rather than holding one completely ousted." (*Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357; see also *Merrill Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117, 127.)

In the present case there is no conflict between the federal and state statutes concerning conduct. "Both the Sherman Act and the Cartwright Act proscribe price fixing—the standard for lawful competitive conduct is identical under both state and federal law." (*Alton Box Bd. Co. v. Esprit de Corp.* (9th Cir. 1982) 682 F.2d 1267, 1274, fn. 11.) In addition, there is no discrepancy between the federal and state schemes with regard to certain remedies. The *Illinois Brick* court left open the possibility of recovery for some indirect consumers where direct purchasers used a "cost-plus" pricing schedule or were owned or controlled by the its customer. (*Illinios Brick Co. v. Illinios, supra,* 431 U.S. 720, 735-736 & fn. 16.) Also, federal case law has held that indirect purchasers may obtain injunctive relief pursuant to section 16 of the Clayton Act even if monetary relief is generally unavailable. (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 600 F.2d 1148, 1167; *Mid-West Paper Products Co. v. Continental Group* (3d Cir. 1979) 596 F.2d 573, 589-594.) Thus, a potential conflict arises only when we compare federal and state remedies with respect to damages.

It has long been established that " ' the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.' " (*California v. Zook* (1949) 336 U.S. 725, 731, citing *United States v. Marigold* (1850) 50 U.S. 559, 569.) The United States Supreme Court has recently confirmed the same principle.

In *Silkwood v. Kerr-McGee Corp., supra* ___ U.S. ___ [___ L.Ed.2d ___, 104 S.Ct. 615], the United States Supreme Court rejected the argument that the Nuclear Regulatory Commission's (NRC) exclusive authority to regulate nuclear safety and provide penalties preempted state punitive recovery under state tort law. "The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts

with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. 42 U.S.C. § 2282 (1976 ed. and Supp. V.). However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." (*Id.*, at p. 626.)

Similarly, in *Hayfield Northern R. v. Chicago & N.W. Transp.* (1984) ___ U.S. ___ [___ L.Ed.2d ___, 104 S.Ct. 2610], the high court upheld a Minnesota condemnation statute which purportedly was preempted by the Staggers Rail Act of 1980. (49 U.S.C. § 10903-10906.) In response to the argument that the state statute allowed shippers to relitigate that price the Interstate Commerce Commission had established for the purchase or subsidizing of railroad lines, the court stated that "although it may seem unfair to allow a shipper a 'second bite at the apple' in state condemnation proceedings after it has participated in . . . negotiations under [federal statute], that second opportunity does not frustrate the purpose of the federal valuation scheme." (*Id.*, at p. 2619.)

In the present situation we see no way that California's remedy for antitrust violations conflicts with the federal remedy. The fact that the injured indirect purchasers may recover under state law does not obstruct the federal scheme which only permits recovery by direct purchasers.[5] As the California Supreme Court has stated, "Questions of whether overcharges were passed on, essential to the indirect purchaser's California claim, are irrelevant to, and thus not subject to inconsistent determination in, a suit on the direct purchaser's federal claim." (*Union Carbide Corp. v. Superior Court, supra,* 36 Cal. 3d 15, 23.) Thus, it cannot be asserted

---

[5] If, for example, the state statute required that all overcharges be paid to indirect consumers, but not direct consumers, there would be a conflict with the federal remedy. However, in the present case, the California statute in no way impinges on recovery of damages by direct purchasers.

that section 16750 either conflicts with federal law or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The statute comports with Congress' express intent to provide a remedy to "*any* person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." (See 15 U.S.C. § 15.) Indeed, we agree, as did our state's Legislature, with Justice Brennan's observation that it is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action. (*Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 754-756.) In any event, we do not view the judicially economic rationale set forth in *Hanover Shoe* and *Illinois Brick* as constituting an adequate basis for a preemption argument.[6]

III. DUE PROCESS

Relying on *Western Union Co. v. Pennsylvania* (1961) 368 U.S. 71, *Cities Service Co. v. McGrath* (1952) 342 U.S. 330, and *Boutte v. Chevron Oil Company* (E.D.La. 1970) 316 F.Supp. 524, defendants also contend that section 16750, by giving claims to indirect purchasers for price-fixed overcharges, violates due process.[7] The contention rests on the assumption that antitrust

---

[6] A similar conclusion was reached in *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick* (1982) 62 Boston University Law Review 1241. That note sets forth an excellent analysis of whether state statutes that authorize indirect purchaser suits so conflict with the federal policies expressed in *Illinois Brick* as to require preemption of the state statutes. The author reasons that since the legislative history of the federal antitrust law, and the case law thereunder, do not evidence a *congressional* intent to displace state law and since the *Illinois Brick* decision is based predominantly on the policy of judicial economy, the Supreme Court's reliance on nonstatutory policies dictates that the decision not be extended to displace state laws that allow such suits.

[7] Defendants also cite *Russo & Dubin v. Allied Maintenance Corp.* (1978) 407 N.Y.S.2d 617, and *In re Wiring Device Antitrust Litigation* (E.D.N.Y. 1980) 498 F.Supp. 79. However, in both of these antitrust actions no state statute provided for suits by indirect purchasers and the due process argument was never fully discussed.

overcharges and penalties result in one common fund; if that common fund is distributed to direct purchasers in federal actions, a subsequent award to indirect consumers in state actions raises the specter of double recovery.

We need not here discuss the possibility that there may be both a federal common fund and a state common fund, or whether a federal award may be used to offset a state award. The potential for multiple liability in the present case is sheer speculation.

First, as both the *Illinois Brick* court and our own Supreme Court have pointed out, " 'there is a greater *hypothetical* danger of multiple recovery where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment.' " (*Union Carbide Corp. v. Superior Court, supra,* 36 Cal.3d 15, 24, quoting *Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 763; emphasis added.) In this case, although an agreed final judgment was entered pursuant to a settlement agreement,[8] no liability under the Sherman Act was admitted and, certainly, the issue of damages was never adjudicated. Thus, there is no indication of the actual damages in the federal action, which would form the basis for a charge of multiple liability.

Second, there is nothing to show at this pleading stage of the proceedings that a duplicative recovery will occur. We are merely called upon to review whether plaintiff has stated a cause of action. It is not the function of this court to give advisory opinions on how to avoid a potential multiple recovery. We, as others, are confident that when the threat of double recovery occurs, the trial court will fashion relief accordingly. (See *Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 761-762.)

---

[8] See footnote 2, ante.

The trial court's order overruling defendants' demurrer is affirmed and the alternative writ is discharged.

CERTIFIED FOR PUBLICATION.

Rouse, J.

WE CONCUR:

Kline, P.J.

Smith, J.

Pillsbury, Madison & Sutro
James F. Kirkham
Debra B. Keil
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Attorneys for Defendant
Crown Oil Corporation

Baker & McKenzie
Jaun G. Collas
Bruce H. Jackson
Jonathan S. Kitchen
580 California Street, 5th Floor
San Francisco, CA 94104
Telephone: (415) 576-3000
Attorneys for Defendants
Granex Corporation, U.S.A.
And Pan Pacific Commodities

In the Superior Court
of the
State of California, in and for the
City and County of San Francisco

No. 829235

Lapidus Popcorn, Inc.,
Plaintiff,

vs.

Crown Oil Corporation; Granex Corporation, U.S.A.;
Pan Pacific Commodities, and Does I through XXX,
Defendants.

ORDER OVERRULING DEFENDANTS' DEMURRER TO PLAINTIFF'S COMPLAINT

[Filed May 9, 1985]

Defendants *Crown Oil Corporation, Granex Corporation, U.S.A.* and *Pan Pacific Commodities* demurred to plaintiff Lapidus Popcorn Inc.'s complaint on the ground that the provision of California's Cartwright Act, Business and Professions Code, Section 16750, which permits treble damage actions by indirect purchasers, is preempted by federal law as set out in the United States Supreme Court's Ruling in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 Ld.2d 707 (1977), *rehearing denied,* 434 U.S. 881, 98 S.Ct. 243 (October 3, 1977) and elsewhere.

The defendants have settled a Sherman Act price fixing overcharge case with a Federal class of direct purchasers, MDL 474. This suit seeks price fixing overcharge damages under the Cartwright Act on behalf of California business indirect purchasers who purchased from direct purchasers encompassed within the MDL 474 Federal class.

The hearing on Defendants' demurrer came on regularly before this Court in Department 8 on April 4, 1985, the Honorable Roy L. Wonder presiding. Plaintiff appeared by Francis O. Scarpulla of Scarpulla & Scarpulla, the Attorney General of the State of California as *Amicus Curiae* appeared by Patricia A. Cutler, defendant Crown Oil Corporation appeared by James F. Kirkham of Pillsbury, Madison & Sutro and defendants Granex Corporation, U.S.A. and Pan Pacific Commodities appeared by Jonathan S. Kitchen of Baker & McKenzie.

Having considered the moving and opposition papers, the arguments of counsel, and the records and files herein, it is hereby ordered that:

1. Defendants' demurrer is overruled;

2. The United States Congress has not expressed, by unambiguous language, an intention to preempt the California Cartwright Act's indirect-purchaser damage provision;

3. The California Cartwright Act's indirect-purchaser, damage provision does not conflict with federal antitrust law; and

4. The California Cartwright Act's indirect-purchaser damage provision does not stand as an obstacle to the accomplishment of the full purposes and objectives of Section 4 of the Clayton Act.

Dated: May 9, 1985.

ROY L. WONDER
Judge of the Superior Court

Approved as to form:

Francis O. Scarpulla
Stephen V. Scarpulla
Scarpulla & Scarpulla
A Professional Corporation

Mario N. Alioto
Law Office of Mario N. Alioto

Joseph N. Patane
Law Office of Joseph N. Patane

Attorneys for Plaintiff

By FRANCIS O. SCARPULLA
Francis O. Scarpulla

Baker & McKenzie
Juan G. Collas, Jr.
Bruce H. Jackson
Jonathan S. Kitchen

Attorneys for Defendants
Granex Corporation, U.S.A., and
Pan Pacific Commodities

Pillsbury, Madison & Sutro
James F. Kirkham
Debra B. Keil

Attorneys for Defendant
Crown Oil Corporation

By JAMES F. KIRKHAM
James F. Kirkham

Court of Appeal of the State of California
in and for the
First Appellate District
Division: 2

Crown Oil Corp., et al.

vs.

Superior Court, City & County of S.F.
Lapidus Popcorn, Inc.
A031735
San Francisco County No. 829235

[Filed June 26, 1985]

By the Court:

The petition for writ of mandate is denied.

Dated: June 26, 1985

KLINE, P.J.

Order Granting Review
After Judgment by the Court of Appeal
First District, Division Two, No. AO31735

In the Supreme Court of the State of California

In Bank

Crown Oil Corporation et al.,
Petitioners,

v.

Superior Court of the City and County
of San Francisco et al.,
Respondent;
Lapidus Popcorn, Inc., Real Party in Interest

[Filed Aug. 21, 1985]

Petition for review GRANTED. The matter is transferred to the Court of Appeal, First Appellate District, Division Two, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar.

Chief Justice

KAUS
Associate Justice

GRODIN
Associate Justice

LUCAS
Associate Justice

BROUSSARD
Associate Justice

Associate Justice

Associate Justice

Court of Appeal of the State of California
in and for the
First Appellate District

Division Two

No. A031735

Superior Court No. 829235

Crown Oil Corporation, et al.,
Petitioners,

vs.

Superior Court of the State of
California, in and for the City
and County of San Francisco,
Respondent,
Lapidus Popcorn, Inc.,
Real Party in Interest.

[Filed March 13, 1986]

By the Court:

The petition for rehearing is denied.

Dated March 13, 1986

KLINE, P.J.

Order Denying Review
After Judgment by the Court of Appeal
1st District, Division 2, No. A031735
In the Supreme Court of the State of California
In Bank

Crown Oil Corporation et al., Petitioners,

v.

Superior Court of the City and County
of San Francisco, Respondent;
Lapidus Popcorn, Inc., Real Party in Interest.

[Filed May 22, 1986]

Petition for review of petitioners GRANEX CORPORATION, U.S.A. and PAN PACIFIC COMMODITIES DENIED.

Grodin, J., Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD
Chief Justice

No. 1/2 A031735

In the Supreme Court of the State of California

In Bank

Crown Oil Corporation et al., Petitioners,

v.

Superior Court of the City and County of San Francisco, Respondent;
Lapidus Popcorn, Inc., Real Party in Interest

[Filed June 2, 1986]

Due to clerical error, the order of this court, filed May 22, 1986, in the above-entitled matter, insofar as it reads "Petition for review of petitioners Granex Corporation, U.S.A. and Pan Pacific Commodities DENIED." is hereby amended to read "Petition for review DENIED."

/s/ BIRD
Chief Justice

In the Court of Appeal of the
State of California
For the First Appellate District

No. A031735

Crown Oil Corporation, Granex Corporation, U.S.A.
and Pan-Pacific Commodities,
Appellants,

v.

Superior Court of the City and
County of San Francisco,
Appellee;
Lapidus Popcorn, Inc.,
Real Party in Interest

[Filed Aug. 5, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Crown Oil Corporation, Granex Corporation, U.S.A. and Pan-Pacific Commodities, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the California Court of Appeal affirming the trial court's overruling of their demurrer to the Complaint filed by the Real Party in Interest, entered in this action on February 14, 1986, following the California Supreme Court's order denying appellants' petition for review, entered in this action on May 22, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: August 4, 1986.

Baker & McKenzie
Juan G. Collas, Jr.
Jonathan S. Kitchen
Mark D. Patrizio
By: /s/ Jonathan S. Kitchen
Jonathan S. Kitchen
Attorneys for Appellants
Granex Corporation, U.S.A. and
Pan-Pacific Commodities
580 California Street, 5th Floor
San Francisco, California 94104
Telephone: (415) 576-3000

Dated: August 4, 1986.

Pillsbury, Madison & Sutro
James F. Kirkham
Walter R. Allan
Debra B. Keil
By: /s/ Walter R. Allan
Walter R. Allan
Attorneys for Appellant
Crown Oil Corporation
225 Bush Street
Post Office Box 7880
San Francisco, California 94120
Telephone: (415) 983-1000

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants,,

v.

LAPIDUS POPCORN, INC.,
Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

MOTION TO DISMISS APPEAL

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A Professional Corporation
423 Washington Street, 4th Floor
San Francisco, CA 94111
(415) 788-7210
[Additional Counsel Appear on Signature Page]
Counsel for Appellee Lapidus Popcorn, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

13PP

QUESTION PRESENTED

This appeal was taken from a decision of the California Court of Appeal affirming the trial court's order overruling Defendants-Appellants' demurrer to this state antitrust action. Thus, the only question presented here is:

> Whether the Court of Appeal's opinion in *Crown Oil Corporation v. Superior Court,* 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986) deciding that Appellants' *Illinois Brick* demurrer to an indirect-purchaser Cartwright Act case presents a substantial Federal question, should be reviewed by this Court?

DESIGNATION OF CORPORATE RELATIONSHIPS

Lapidus Popcorn, Inc. has no parent company and does not have an ownership interest in any subsidiary.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DISMISSING THE APPEAL	2
A. The appeal should be dismissed for lack of finality	2
B. The California Court of Appeal did not decide the due process issue	3
1. The Court of Appeal's decision is not a final judgment on the federal issue for purposes of state court proceedings	4
2. Review of the Court of Appeal's opinion would not preclude further litigation	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

	Page
Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982)	7
Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	6
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	6
California v. Zook, 336 U.S. 725 (1949)	4, 7
Cities Service Co. v. McGrath, 342 U.S. 330 (1952)	5
Clark v. Kansas City, 172 U.S. 334 (1899)	3
Colorado Anti-discrimination Commission v. Continental Airlines, 372 U.S. 714 (1962)	7
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975)	4, 5
Crown Oil Corporation v. Superior Court, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986)	3, 4
Flynt v. Ohio, 451 U.S. 619 (1981)	4
Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co., 467 U.S. 622 (1984)	5, 7
Illinois Brick v. Illinois, 431 U.S. 720 (1977)	2, 4, 6
In Re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979)	4
McComb v. Commissioners, 91 U.S. 1 (1876)	3
Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892)	3
Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573 (3rd Cir. 1979)	4
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	2
Radio Station WOW v. Johnson, 326 U.S. 120 (1945)	3
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	5, 7
Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961)	5

Other

21 Cong. Rec. 2457 (1890)	6

No. 86-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants.,

v.

LAPIDUS POPCORN, INC.,
Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

MOTION TO DISMISS APPEAL

COUNTERSTATEMENT OF THE CASE

In September 1984, Plaintiff-Appellee, Lapidus Popcorn, Inc. ("Lapidus") filed suit against Defendants-Appellants, Crown Oil Corporation, Granex Corporation, U.S.A. and Pan-Pacific Commodities, alleging a price-fixing conspiracy in violation of both California's antitrust laws (Business and Professions Code, Section 16700, *et seq.*), and its unfair business practices statutes (Business and Professions Code, Section 17200, *et seq.*).

As Lapidus did not purchase coconut oil directly from any defendant, Appellants demurred to the complaint, claiming that the California Superior Court lacked jurisdiction to hear the suit and that the complaint failed to state a cause of action. According to Appellants, to the extent that California's antitrust act permits

indirect-purchaser suits, it conflicts with, and is preempted by, this Court's decision in *Illinois Brick v. Illinois,* 431 U.S. 720 (1977). Moreover, Appellants claim that these California code sections unduly burden interstate commerce.

On May 9, 1985, the trial court entered an order overruling Appellants' demurrer. Appellants' Appendix, p. 12.

The California Court of Appeal initially denied Appellants' petition for mandate. Appellants' Appendix, p. 15. The California Supreme Court instituted the Court of Appeal to hear that petition. Appellants' Appendix p. 16. The Court of Appeal then heard argument and filed the opinion under consideration here. The California Supreme Court subsequently denied Appellants' petition for review after the judgment of the Court of Appeal had been entered. Appellants' Appendix p. 18-19.

Appellants' now seek review of the Court of Appeal's decision in this Court, incorrectly claiming that a substantial federal question is presented.

REASONS FOR DISMISSING THE APPEAL

A. The Appeal Should Be Dismissed for Lack of Finality

Both Title 28 U.S.C. sections, 1257 and 2103, require that the judgment or decree of the highest state court respecting the federal question be final before this Court can entertain an appeal from such an order. As noted in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973), this finality requirement serves ends relating to judicial economy, comity, and federalism because:

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

The Court of Appeal's February 14, 1986 decision affirming the Superior Court's order overruling Appellants' demurrer is not a final order. Finality is lacking where the court overrules a demur-

rer and orders that an answer be filed. *Clark v. Kansas City,* 172 U.S. 334 (1899); *Meagher v. Minnesota Thresher Mfg. Co.,* 145 U.S. 608, 610-611 (1892); *McComb v. Commissioners,* 91 U.S. 1 (1876); For this reason alone, Lapidus respectfully suggests that this Court should dismiss this appeal.

B. The California Court of Appeal Did Not Decide the Due Process Issue

The Court of Appeal held that Appellants had not demonstrated that California's remedy for antitrust violations was preempted by the federal remedy articulated in *Illinois Brick,* and, therefore, left undecided the subsidiary and related due process challenges raised by Appellants in their demurrer. The potential for multiple liability claimed by Appellants could not be litigated at the pleading stage of this case. Any such ruling would constitute "sheer speculation" by the courts and would constitute an impermissible "advisory opinion." *Crown Oil Corporation v. Superior Court,* 177 Cal. App. 3d 604, 223 Cal. Rptr. 164, 169 (1986). Consequently, without a record, the Court of Appeal stated it was premature to consider the due process component of Appellants' preemption claim. *Id.* at 169-170.

Notwithstanding the special concerns of federalism and comity, review of the preemption decision when the related federal due process issue has been left unresolved makes appellate review by this Court at this juncture inappropriate. Justice Frankfurter cautioned against such piecemeal appeals in *Radio Station WOW v. Johnson,* 326 U.S. 120, 127 (1945) stating:

> Of course, where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews.

Despite this apparent facial lack of finality, Appellants suggest that review by this Court is appropriate as the *Crown Oil* decision "involves a direct assault upon the important federal policies recognized in this Court's decision in *Illinois Brick*. . . ." Appellants' Jurisdictional Statement p. 7 fn. 3.

Of course, that is not the issue. The only issue here is whether the *Crown Oil* decision has the requisite finality and, if so, whether a substantial federal question is presented, both of which are lacking here.

1. The Court of Appeal's Decision Is Not a Final Judgment on the Federal Issue for Purposes of State Court Proceedings

The first category invoked by Appellants permits federal appellate review of a state court judgment which is a "final judgment on the federal issue for purposes of state court proceedings," and there is "no probability of piecemeal review with respect to federal issues." *Flynt v. Ohio,* 451 U.S. 619, 621 (1981); see also, *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975).

Only one aspect of the preemption challenge to the complaint was resolved by the California Court of Appeal. Following this Court's precedent, the Court of Appeal first found that it was not the intention of Congress to preempt the field of antitrust enforcement. *Crown Oil, supra,* 223 Cal. Rptr. at 167-68. Furthermore, the Court of Appeal found no conflict between the federal and state statutes concerning conduct condemned under the Sherman Act and the Cartwright Act. *Id.* 167-68 (citing *Alton Box Board Co. v. Esprit de Corp.,* 682 F.2d 1267, 1274 fn.11 (9th Cir. 1982)).

Certain indirect-purchaser remedies survived this Court's decision in *Illinois Brick.* "Cost-plus" pricing to customers, as well as indirect purchasers who buy products from producer-owned or controlled direct purchasers, may still institute federal Sherman Act suits. *Illiniois Brick, supra,* 431 U.S. at 135-36 and fn.16. Indirect purchasers may also maintain actions for injunctive relief. *In Re Beef Industry Antitrust Litigation.* 600 F.2d 1148, 1167 (5th Cir. 1979); *Mid-West Paper Products Co. v. Continental Group,* 596 F.2d 573, 589-594 (3rd Cir. 1979). Thus, in indirect-purchaser actions, a potential conflict arises only when comparing federal and state remedies with respect to damages.

That an offense against both state and federal statutes might draw separate prosecutions and differing penalties from each is not evidence of federal preemption, as Appellants urge. *California*

v. Zook, 336 U.S. 725, 730-31 (1949). Using the more recent, and far more complex statutory schemes in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) and *Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co.*, 467 U.S. 622 (1984), the California Court of Appeal concluded that the Cartwright Act's remedy for antitrust violations did not conflict with the federal remedy.

Left unresolved was the related due process challenge raised by Appellants under the so-called "common fund" theory.[1] This issue, derivative of the preemption claim, was not decided by the Court of Appeal. A ruling on this due process claim could not and should not be made in a hypothetical vacuum. To date, no California court has had the opportunity to fashion a method for assessing damages for indirect-purchaser Cartwright Act suits.

Therefore, as the Court of Appeal's opinion did not finally resolve the due process issue, no final, substantial federal question is presented here and this appeal should be dismissed.

2. Review of the Court of Appeal's Opinion Would Not Preclude Further Litigation

The second category into which Appellants attempt to place this appeal permits interlocutory review by this Court when "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," *Cox Broadcasting, supra*, 420 U.S. at 482-83. Appellants claim that the case involves "identifiable federal statutory or constitutional

---

[1] Appellants' reliance on *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961) and *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952) distorts the holdings in these cases. Neither involves any wrongdoing by defendants. Both involve competing interests to possession of the same property. Underlying Appellants' use of these "due process" decisions is the unsubstantiated assumption that each tortious wrongdoing should produce only one fund from which injured parties can claim. That assumption ignores the fact that antitrust law is derived from intentional tort law. Consequently, the wrongdoer is responsible for payment to anyone foreseeably injured, not merely for creation of some single fund created by the overcharge.

policies which would [be] undermined by the continuation of the litigation in the state courts."

No federal statutory or constitutional policies are being undermined by the prosecution of this indirect-purchaser suit.

Neither the Sherman Act nor the Clayton Act precludes indirect-purchaser suits. As a rule of judicial economy, this Court's *Illinois Brick* opinion concluded that "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under Section 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge. . . ." *Illinois Brick, supra,* 431 U.S. at 746.

This Court's decision was neither a rule of standing, nor a decision of constitutional proportions. *Id.* at 728 fn.7; see also *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535 fn.31 (1983). *Illoinis Brick* was a decision concerning statutory construction only. *Id.* at 736. This Court apparently determined that ordinarily the indirect purchaser theory of damages should not be imposed on the federal judiciary. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 475 fn.11 (1982); *Associated General Contractors of California, supra,* 459 U.S. at 544 fn.51.

Illinois Brick did not vitiate a states' authority to permit their courts the opportunity to fashion damage remedies for indirect-purchaser actions brought under state statutes.

The legislative history of the Sherman Act, 15 U.S.C., Section 1, reveals that the Act's sponsor, Senator Sherman, did not intend it to preempt state antitrust laws:

> This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to *supplement the enforcement of the established rules of the common and statute laws by the several states* in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power, that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. . . . 21 CONG. REC. 2457 (1890) (Statement of Senator Sherman) (emphasis added).

Where the federal and state governments have concurrent power to regulate the same conduct, state laws providing a cumulative, different or harsher remedy are not preempted unless the states' power to fashion a remedy has been specifically withdrawn by Congress. *Agency Rent-A-Car, Inc. v. Connolly,* 686 F.2d 1029, 1036-40 (1st Cir. 1982).

This is especially true where the state is acting pursuant to its traditional police powers and both regulatory schemes provide for identical standards of conduct, differing solely as to remedies. *Colorado Anti-discrimination Commission v. Continental Airlines,* 372 U.S. 714 (1962); *California v. Zook, supra.*

In *Silkwood* this Court reaffirmed this principle when it rejected the argument that the Nuclear Regulatory Commission's exclusive authority to regulate nuclear safety preempted state punitive damage recovery under tort law:

> The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. 42 U.S.C. Section 2282 (1976 ed. and Supp. V). However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

Silkwood, supra, 464 U.S. at 257; see also, *Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co.,* 467 U.S. 622 (1984).

For these reasons Appellee respectfully suggests that this court should dismiss this appeal.

CONCLUSION

For each of the reasons stated above, Appellee respectfully suggests that this appeal should be dismissed.

Dated: September 18, 1986

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A PROFESSIONAL CORPORATION
423 Washington Street, 4th Floor
San Francisco, CA 94111

MARIO N. ALIOTO
JOSEPH M. PATANE
LAW OFFICES OF
MARIO N. ALIOTO
2280 Union Street
San Francisco, CA 94123
Counsel for Appellee
Lapidus Popcorn, Inc.

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-287

SUPREME COURT OF THE UNITED STATES

CROWN OIL CORPORATION; GRANEX CORPORATION, U.S.A.; and PAN PACIFIC COMMODITIES

Appellants,

vs.

LAPIDUS POPCORN, INC.

Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

---

PETITION OF THE CALIFORNIA ATTORNEY GENERAL FOR INTERVENTION AND MOTION TO DISMISS OR AFFIRM

JOHN K. VAN DE KAMP
Attorney General
of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
SANFORD N. GRUSKIN
Assistant Attorney General
THOMAS P. DOVE
Deputy Attorney General
6000 State Building
San Francisco CA 94102
Telephone: (415) 557-0357

SPIEGEL CUTLER LIAO & KAGAY
PATRICIA A. CUTLER
Suite 660
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 956-5959

Counsel for the State of California

TABLE OF CONTENTS

	Page
MOTION OF THE CALIFORNIA ATTORNEY GENERAL TO DISMISS OR AFFIRM	1
BASIS FOR INTERVENTION	1
STATEMENT OF THE CASE	1
INTRODUCTION	1
THE CALIFORNIA COURT'S DUE PROCESS HOLDING IS NOT A FINAL DECISION	3
THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION	8
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

California v. Zook,
336 U.S. 725 (1949) 14

Carey v. Sugar,
425 U.S. 73 (1976) 7

In re Chicken Antitrust Litigation,
669 F.2d 228 (5th Cir. 1982) 16,17

Clark v. Kansas City,
172 U.S. 334 (1899) 5

Colorado Anti-Discrimination Comm'n v.
Continental Airlines,
372 U.S. 714 (1962) 14

Cox v. Cohn,
420 U.S. 469 (1975) 5,6

Exxon v. Governor of Maryland,
437 U.S. 117 (1978) 12

Flynt v. Ohio,
451 U.S. 619 (1981) 5,6

Gospel Army v. Los Angeles,
331 U.S. 543 (1947) 5

Grays Harbor Logging Co. v. The Fordney Co.
243 U.S. 251 (1917) 8

Hayfield Northern Ry. v. Chicago &
N.W. Transp.,
104 S.Ct. 2610 (1984) 12,14

TABLE OF AUTHORITIES (cont.) Page

CASES (cont.)

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) passim

McComb v. Commissioners,
91 U.S. 1 (1876) 4

Meagher v. Minnesota Threasher Mfg. Co.,
145 U.S. 608 (1892) 4

North Dakota Pharmacy Board v. Snyder's Stores,
414 U.S. 156 (1973) 4-5,8

Salveson v. Western States Bancard Assn.,
525 F.Supp. 566 (N.D. Cal. 1981),
affd. 731 F.2d 1423 (9th Cir. 1984) 13

San Diego Gas & Electric Co. v. San Diego,
450 U.S. 621 (1981) 8

Silkwood v. Kerr-McGee,
464 U.S.238 (1984) 11,14

Union Carbide Corp. v. Superior Court,
36 Cal. 3d 15 (1984) 7,14

Utah Power & Light Co. v. Pfost,
286 U.S. 165 (1932) 7

STATUTES

28 U.S.C. section 1257(2) 2,3,8

28 U.S.C. section 2403(b) 1

Business and Professions Code,
section 16700 et seq. 2

Business and Professions Code,
section 16750(a) 2

Clayton Act, section 4 10

PETITION OF THE CALIFORNIA ATTORNEY GENERAL FOR INTERVENTION

The California Attorney General, on behalf of the State of California, hereby petitions the Court for permission to intervene pursuant to 28 U.S.C. section 2403(b), which provides:

> "In any action, suit, or proceeding in a court of the United States to which a state or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that state affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the state, and shall permit the state to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."

The California Attorney General was not a party to the state court action giving rise to this appeal

but appeared as amicus curiae at all stages of the state court proceedings.

The defendants' Jurisdictional Statement on appeal herein states that the "proceeding draws into question the constitutionality of California Business and Professions Code section 16750(a) (as amended in 1978)." The California statute in question provides rights to citizens, businesses and governmental entities under the California antitrust laws and thereby affects the public interest.

/

/

/

/

/

/

/

/

/

/

/

/

/

For the foregoing reasons, it is respectfully submitted that the intervention of the California Attorney General in this appeal is proper under 28 U.S.C. section 2403(b).

DATED: September 16, 1986

JOHN K. VAN DE KAMP, Attorney General
of the State of Califoria
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
SANFORD N. GRUSKIN
Assistant Attorney General
THOMAS P. DOVE
Deputy Attorney General

SPIEGEL CUTLER LIAO & KAGAY
PATRICIA A. CUTLER

MOTION OF THE CALIFORNIA ATTORNEY GENERAL TO DISMISS OR AFFIRM

The California Attorney General, appearing as an intervenor, hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the California Court of Appeal without further argument on the grounds that the decision is, in part, not final, and does not present a substantial federal question.

BASIS FOR INTERVENTION

The California Attorney General has petitioned this Court for permission to intervene in this appeal pursuant to 28 U.S.C. section 2403(b).

STATEMENT OF THE CASE

The California Attorney General relies upon appellee Lapidus Popcorn's statement of the case.

INTRODUCTION

Defendants' appeal challenges the decision of the California Court of Appeal affirming the Superior Court's order overruling defendants' demurrer to the complaint in this action. The California Court of

Appeal held that: 1) federal law did not preempt California law, Business and Professions Code section 16750(a), which gives rise to indirect purchaser claims under California's antitrust law, Business and Professions Code section 16700, et seq.; and 2) defendants' claim of violation of due process based on the possibility of duplicative recovery under California law is hypothetical and premature.

The California Attorney General submits that this appeal should be dismissed or, in the alternative, that the decision of the Court of Appeal should be affirmed without further argument, because: 1) the decision of the Court of Appeal is not final under 28 U.S.C. section 1257(2) on the issue of due process, in that plaintiff's damage claims have not been finally decided and therefore defendants' due process concerns are not ripe for decision; and 2) no substantial federal question has been presented, in that the Californa Court of Appeal decision upholding California's indirect purchasers statute does not contravene any federal constitutional or statutory right, law or policy.

THE CALIFORNIA COURT'S DUE PROCESS HOLDING IS NOT A FINAL DECISION

The jurisdiction of the Supreme Court to review the state court decision in this case is based on 28 U.S.C. section 1257(2):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Supreme Court jurisdiction over a state court decision is premised on a final judgment in the state court. The requirement of finality for review of state court decisions is rooted in the concern for judicial economy, comity and federalism:

> "This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in state litigation only after 'the highest court of the state in which a decision in the suit could be had' has rendered a final judgment or decree." North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159-160 (1973)

In this case, a demurrer has been overruled, thereby allowing plaintiff's state court action to proceed beyond the filing of the complaint. This Court has generally held that such a decision lacks sufficient finality to be appealable. McComb v. Commissioners, 91 U.S. 1 (1876); Meagher v. Minnesota Threasher Mfg.

Co., 145 U.S. 608 (1892); Clark v. Kansas City, 172 U.S. 334 (1899); Gospel Army v. Los Angeles, 331 U.S. 543, 546 (1947).

Since there is no final judgment here, defendants instead assert appellate jurisdiction based on Cox v. Cohn, 420 U.S. 469 (1975) and Flynt v. Ohio, 451 U.S. 619 (1981), which delineate certain exceptions to the requirement of a final judgment, where federal issues are finally decided or are dispositive of the entire case although no final judgment is entered. However, with respect to the due process holding of the California court, defendants reliance upon Cox and Flynt is misplaced.

On the basis of the Cox finality exceptions, defendants argue that the California ruling is final as to the "federal issue" in question. While defendants do not discuss the point, the "federal issue" in question is, in fact, two distinct federal issues which were considered by the California Court of Appeal: preemption and due

process.[1] Only one of these issues, preemption, was, in any sense, the subject of final decision. The California Court of Appeal decided that California's indirect purchasers statute was not in actual conflict with federal law, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), which allows, with certain exceptions, only direct purchasers to recover overcharges under federal antitrust law. The California court then properly found that defendants' due process challenge was premature.

Clearly the California Court did not and could not properly decide defendants' due process claim. As the California Court of Appeal correctly observed:

> "The potential for multiple liability in the present case is sheer

---

[1] Defendants' Jurisdictional Statement discusses the merits of their appeal for eight (8) pages and relegates the theory of jurisdiction to a footnote. Their brief footnote cites the holdings in two cases, Cox, supra, and Flynt, supra, without applying them to the actual proceedings in this matter. Under the circumstances, it is extremely difficult to surmise what defendants' arguments are, let alone counter them.

speculation .... There is nothing to show, at the pleading stage of the proceedings, that a duplicative recovery will occur." Appellant's Appendix (App.) p. A-10.

While we do not concede that defendants' due process claims will have any future merit, due process only becomes an issue, if at all, when the California courts fashion specific remedies and thereby construe the indirect purchaser law. California's law has not yet been construed or applied. App. p. A-10; Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15 (1984).[2/]

Defendants' due process claim is similar to the due process claims asserted in eminent domain cases. This Court has held that eminent domain cases involving due process challenges under the Fifth

---

2/ In the absence of construction, it cannot be presumed that the state courts will construe a state statute in a fashion that is repugnant to federal laws or the Constitution. Carey v. Sugar, 425 U.S. 73 (1976); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Amendment are final only when every aspect of the "taking" and "compensation" have been litigated. Grays Harbor Logging Co. v. The Fordney Co., 243 U.S. 251 (1917); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); ("The federal constitutional question embraces not only a taking, but a taking on payment of just compensation. . . . [A] state judgment is not final unless it covers both aspects of that integral problem." North Dakota Pharmacy Board v. Snyders Stores, supra, 414 U.S. at 163.)

Defendants' due process claims were not decided below and are premature. Thus, the California Court of Appeal decision on due process is not final under either 28 U.S.C. section 1257 (2) or the Cox exceptions.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

This case presents no substantial federal question because defendants have not delineated any federal constitutional or statutory rights or policies that are contravened by California's indirect purchaser statute.

The essence of defendants' preemption challenge is the assertion of non-existent federal rights and policies allegedly arising from this Court's decision in Illinois Brick Co. v. Illinois, supra, 431 U.S. 720. Defendants insist that the Illinois Brick decision provides: 1) a federal right to immunity from state law damage actions by indirect purchasers; and 2) a federal right to settle federal antitrust suits free of any disincentives to settlement possibly created by state laws. Finally, on the basis of the holding in Illinois Brick, defendants assert that state court suits by indirect purchasers impermissibly burden the federal courts and undercut direct purchaser recovery.

The federal rights and policies asserted by defendants are essential to their preemption arguments and their position that a substantial federal question now exists. However, as we demonstrate below, there is no foundation for the rights and policies that defendants assert.

It is essential to defendants' preemption argument that an irreconcilable conflict exist here,

that federal remedies and state remedies are unable to co-exist. But defendants postulate a non-existent conflict. They do so by misstating the purposes and objectives of federal law and by assuming a particular construction of yet-to-be construed state law.

Defendants argue that Illinois Brick v. Illinois, supra, 431 U.S. 720, preempts California's indirect purchaser remedy, because that decision creates a federal right to protection from multiple liability. This Court did hold in Illinois Brick that in most instances relief under the federal statute would not impose multiple liability. However, the Court there in no way purported to define or limit the availability of state remedies or defendants' liability under state law. In Illinois Brick the Court was engaged in a limited search for Congressional intent as to the scope of relief under Clayton Act, section 4:

> " . . . but on balance, and until clear direction from Congress to the contrary, we conclude that the Legislative purpose in creating a group

> of private attorneys general to enforce the antitrust laws under section 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge . . ." 431 U.S. at 746.

State laws or remedies were never discussed in Illinois Brick.

The Court's interpretation of the scope of federal relief cannot be read to indicate an intention to preempt state remedies in Illinois Brick. Here, as in Silkwood v. Kerr-McGee, 464 U.S.238 (1984), there is no showing of a Congressional intention to preempt state remedies, and the absence of such a showing is fatal to defendants' claim of preemption. Id. at 255.

The Court's decision in Illinois Brick to bar indirect purchasers from recovering was the incidental consequence of the Court's decision to concentrate the federal remedy in the hands of the direct purchaser, a trade-off tolerated under the federal scheme. This toleration of incidental harm to indirect purchasers can

certainly not be elevated to a federal right protecting defendants from indirect purchasers' suits.[3/] The federal courts have consistently held that a failure to provide relief under a federal scheme cannot be elevated to the status of a federal right or protection which would bar further or differing state regulation, including relief, based on the same conduct. See Exxon v. Governor of Maryland, 437 U.S. 117 (1978).

Defendants' argument that Illinois Brick bars state indirect purchaser suits is based on the existence of an assumed "federal purpose" that does not exist. This Court recently rejected a similarly overdrawn "federal purpose" in Hayfield Northern Ry. v. Chicago & N.W. Transportation, 104 S.Ct. 2610 (1984), where a railroad argued that Minnesota law mandating condemnation in state court by shippers was preempted

---

3/ Nowhere in Illinois Brick is such protection discussed or implied. To the contrary, the standing of indirect purchasers to sue is specifically preserved in that decision. Illinois Brick v. Illinois, supra, 431 U.S. at 728, note 7.

by Interstate Commerce Commission procedures established for shipper takeover of railroads. Id. at 2619:

> "Although it may seem unfair to allow a shipper a second bite of the apple in state condemnation proceedings after it has particpated in, and then withdrawn from negotiations under section 10905, that second opportunity does not frustrate the purpose of the federal valuation scheme."

California's indirect purchaser statute is wholly consistent with federal law and policy. State and federal antitrust laws are parallel and concurrent schemes of regulation. See discussion in Salveson v. Western States Bancard Assn. 525 F.Supp. 566, 573, (N.D. Cal. 1981), affd. 731 F.2d 1423 (9th Cir. 1984). Where federal and state governments have concurrent powers to regulate the same conduct, state laws that provide a cumulative, different or harsher remedy are

not preempted, unless the state's power to fashion a remedy is specifically withdrawn by Congress. California v. Zook, 336 U.S. 725, 731 (1949); Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1962); Silkwood v. Kerr-McGee Corp., supra., 464 U.S. 238, 257 (1984); Hayfield Northern Ry. v. Chicago & N.W. Transp., 104 S.Ct. 2610 (1984).

Thus, Illinois Brick does not bar state law remedies which are cumulative of federal remedies. However, even if such state remedies were barred, there is no indication, at present, that such remedies would be imposed. Defendants assert that California law allows cumulative remedies which they describe as "multiple liability." However, it has not been established that California does allow "multiple liability," since California's law has not been construed or applied by the California court. See Union Carbide Corp. v. Superior Court, supra, 36 Cal.3d 15 (1984). "There is nothing to show at this pleading stage of the proceeding that duplicative recovery will occur." App. p. A-10. Rather, the California Court of Appeal has

indicated quite clearly that multiple liability is not likely to occur: "We, as others, are confident that when the threat of double recovery occurs, the trial court will fashion relief accordingly." App. p. A-10.

Defendants claim that "quite apart from the issue of multiple liability, [the] indirect purchaser suits impede settlement, reduce the amount available to direct purchasers and reintroduce the complexity of pass-on calculations that Illinois Brick prohibited." Defendants' reasoning on these issues is flawed, and their assertion of federal policy is without foundation.

Contrary to defendants' view, there is no constitutional right to settle direct purchaser suits free of any disincentives created by state laws. The only authority they cite for this is "federal policy" favoring settlement. Jurisdictional Statement, p. 11. Defendants do not and cannot find support for a federal or constitutional right to settle lawsuits that is of such magnitude that it strikes down remedies that state law has fashioned for those who suffer actual harm.

A natural consequence of our federal system, which creates legislative bodies and court systems with overlapping authority, is that many acts are subject to recovery under more than one set of laws, and these laws are not always identical. If the difficulty of settling a lawsuit subject to concurrent federal and state regulation were a ground for preemption, there could be no such concurrent regulation.

Relying on In re Chicken Antitrust Litigation, 669 F.2d 228 (5th Cir. 1982), defendants argue that compensation of indirect purchaser claims creates an impermissible burden on the federal judiciary and the settlement process, and that the federal claims of direct purchasers have been and will be reduced by compensation of indirect purchasers. In fact, no impermissible burden on the federal courts has occurred or will occur, nor has compensation of direct purchasers been threatened. Indeed, as Chicken illustrates, a federal court can exercise its discretionary pendent jurisdiction over state claims, as appropriate, to effect

just the sort of global settlement that defendants claim is impeded by the state remedy.

Finally, defendants' argument that indirect claims encroach on recovery by the direct purchasers is unsupportable. Defendants do not and cannot show that the California statute in any way diminishes the recovery due to a direct purchaser under federal law. The California court of Appeal foreclosed that possibility:

> "If, for example, the state statute required that all overcharges be paid to indirect consumers, but not direct consumers, there would be a conflict with the federal remedy. However, in the present case, the California statute in no way impinges on recovery of damages by direct purchasers." App. p. A-8 (fn.5).

Defendants argue that in In re Chicken Antitrust Litigation, supra, 669 F.2d 228, settlement funds for direct purchasers were diminished because

indirect purchasers shared in the settlement. This was not the case. The court in the Chicken case recognized that the settlement fund was based upon the claims of the direct and indirect purchasers. Since the magnitude of the fund reflected both sets of claims, both sets of purchasers were compensated. Neither direct or indirect purchasers were taking anything from each other.

In sum, defendants have failed to make a valid argument that any federal right or policy has been contravened by the existence of California's indirect purchaser statute. As a consequence, they have not presented a substantial federal question for this Court to decide.

/

/

/

/

/

/

/

/

CONCLUSION

For the foregoing reasons, the State of California respectfully submits that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Court of Appeal without further argument.

DATED: September 16, 1986

JOHN K. VAN DE KAMP, Attorney General
of the State of Califoria
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
SANFORD N. GRUSKIN
Assistant Attorney General
THOMAS P. DOVE
Deputy Attorney General

SPIEGEL CUTLER LIAO & KAGAY
PATRICIA A. CUTLER

Counsel for the State of California

CERTIFICATE OF SERVICE BY MAIL

NO. 86-287
SUPREME COURT OF THE UNITED STATES

CROWN OIL CORPORATION; GRANEX CORPORATION, U.S.A.; and PAN PACIFIC COMMODITIES
Appellants,
vs.
LAPIDUS POPCORN, INC.
Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

I, THOMAS P. DOVE, certify:

I am a Deputy Attorney General of the State of California and am filing with this Certificate an executed notice of entry of appearance. My business address is 6000 State Building, San Francisco, California 94102. I served on all counsel required to be served a copy of the PETITION OF THE CALIFORNIA ATTORNEY GENERAL FOR INTERVENTION AND MOTION TO DISMISS OR AFFIRM by causing a copy of this pleading to be placed in envelopes addressed to all counsel listed below. Included on each such envelope was a copy of an appearance form for JOHN K. VAN DE KAMP, Attorney General of the State of

California; ANDREA SHERIDAN ORDIN, Chief Assistant Attorney General; SANFORD N. GRUSKIN, Assistant Attorney General; THOMAS P. DOVE, Deputy Attorney General, 6000 State Building, San Francisco, California 94102; telephone: (415) 557-0357; AND SPIEGEL CUTLER LIAO & KAGAY: PATRICIA A CUTLER, Three Embarcadero Center, Suite 660, San Francisco, California 94111; telephone: (415) 956-5959.

Each said envelope was then, on September 18, 1986, sealed with postage fully prepaid and deposited in the United States mail at San Francisco, California.

Executed on September 18, 1986 at San Francisco, California.

Thomas P. Dove

THOMAS P. DOVE
Deputy Attorney General

PILLSBURY, MADISON & SUTRO
James F. Kirkham
Walter R. Allan
225 Bush Street
Post Office Box 7880
San Francisco CA 94120

Francis O. Scarpulla
Stephen V. Scarpulla
SCARPULLA & SCARPULLA
4th Floor
423 Washington Street
San Francisco CA 94111

Juan G. Collas, Jr.
Jonathon S. Kitchen
BAKER & McKENZIE
101 California Street
Post Office Box 5258
San Francisco CA 94120

Mario N. Alioto
Law Office of Mario N. Alioto
2280 Union Street
San Francisco CA 94123

CLERK OF THE SUPERIOR COURT
COUNTY OF SAN FRANCISCO
City Hall
San Francisco CA 94102

Supreme Court, U.S.
FILED
OCT 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 86-287

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CROWN OIL CORPORATION;
GRANEX CORPORATION, U.S.A.
and PAN PACIFIC COMMODITIES,

Appellants,

v.

LAPIDUS POPCORN, INC.,

Appellee.

BRIEF IN OPPOSITION TO MOTION OF OIL COMPANY AMICI FOR LEAVE TO FILE AMICUS BRIEF

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A PROFESSIONAL CORPORATION
423 Washington Street
4th Floor
San Francisco, CA 94111
(415) 788-7210

[Additional Counsel Appear
on Signature Page]
Counsel for Appellee
Lapidus Popcorn, Inc.

8 pp

No. 86-287

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CROWN OIL CORPORATION;
GRANEX CORPORATION, U.S.A.
and PAN PACIFIC COMMODITIES,

Appellants,

v.

LAPIDUS POPCORN, INC.,

Appellee.

BRIEF IN OPPOSITION TO MOTION OF OIL COMPANY AMICI FOR LEAVE TO FILE AMICUS BRIEF

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A PROFESSIONAL CORPORATION
423 Washington Street
4th Floor
San Francisco, CA 94111
(415) 788-721

[Additional Counsel Appear
on Signature Page]
Counsel for Appellee
Lapidus Popcorn, Inc.

Appellant, Lapidus Popcorn, Inc., pursuant to Rule 36.3, objects to the motion of the six oil company *amici* for leave to file an *amicus* brief because: (1) the filing of an *amicus* brief without obtaining the consent is "not favored"; (2) the offered *amicus* brief does not discuss the jurisdictional question, which is the only issue now before this Court; (3) *amici* did not address a written request to the parties requesting consent to file their brief; and (4) *amici* have not stated that the appellants' jurisdictional brief was inadequate. Thus, *amici*'s brief deals only with the merits of the appeal itself and has nothing to do with the jurisdictional issue.

As this Court knows, this appeal has been taken from the overruling of a demurrer in the California Superior Court, which ruling was affirmed by the California Court

of Appeal. See, Crown Oil Corporation v. Superior Court (1986) 177 Cal. App. 3d 604, 223 Cal. Rptr. 164.

As this Court also knows, the undisputed facts of this case show that there was no prior federal antitrust judgment that could possibly conflict with this state-court action. The federal case involved a settlement of a disputed federal action with a specific disclaimer of any antitrust liability. Significantly, none of the federal plaintiffs was paid any cash, but merely received so-called "script" for future purchases of coconut oil. The cash payment of some $2 million was reserved for the federal plaintiffs' counsel. Additionally, there was no evidence that the federal direct-purchasing class member who resold to Lapidus even participated in the federal settlement fund. Therefore, as this action

is in its initial pleading stages and there was no evidence of even a remote possiblity of multiple liability, the appeal should be dismissed.

Thus, as amici have failed to address this jurisdictional issue, Appellant respectfully suggests that this motion to file an amicus brief be denied.

Dated: September 30, 1986

FRANCIS O. SCARPULLA
STEPHEN V. SCARPULLA
SCARPULLA & SCARPULLA
A PROFESSIONAL CORPORATION
423 Washington Street
San Francisco, CA 94111
Telephone: (415) 788-7210

MARIO N. ALIOTO
LAW OFFICE OF MARIO N. ALIOTO
2280 Union Street
San Francisco, CA 94123
Telephone: (415) 563-7200

JOSEPH M. PATANE
LAW OFFICE OF JOSEPH M. PATANE
2280 Union Street
San Francisco, CA 94123
Telephone: (415) 563-7200

Counsel for Appellee
Lapidus Popcorn, Inc.

By Francis O. Scarpulla
Francis O. Scarpulla

PROOF OF SERVICE BY MAIL

I declare that I am employed in the office of a member of the bar of this Court at whose direction service of the attached document was made.

I am over the age of 18 and not a party to this action. My business address is 423 Washington Street, Fourth Floor, San Francisco, California 94111.

On the 6th day of October, 1986, I served the attached document to the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

(SEE ATTACHED SERVICE LIST)

Angie Tytherleigh

Angie Tytherleigh

SERVICE LIST

Juan G. Collas, Jr., Esq.
Bruce H. Jackson, Esq.
Jonathan S. Kitchen, Esq.
Baker & McKenzie
580 California Street
5th Floor
San Francisco, CA 94104

James F. Kirkham, Esq.
Debra B. Keil,
Attorney at Law
Pillsbury, Madison & Sutro
225 Bush Street
P.O. Box 7880
San Francisco, CA 94120

Otis Pratt Pearsall
Philip H. Curtis
Bruce R. Kelly
Hughes Hubbard & Reed
One Wall Street
New York, New York 10005

Andrew J. Kilcarr
Maureen O'Bryon
Donovan Leisure Newton
& Irvine
1850 K Street, N.W.
Suite 1200
Washington, D.C. 20006

William Simon
William R. O'Brien
Robert M. Bruskin
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

SERVICE LIST
(Continued)

Leslie C. Randall
Texaco Inc.
10 Universal City Plaza
Suite 1300
Universal City, CA 91608

Darryl Snider
Brobeck, Phleger
& Harrison
444 South Flower Street
Suite 4300
Los Angeles, CA 90071

Philip K. Verleger
David A. Destino
McCutchen, Black,
Verleger & Shea
600 Wilshire Boulevard
Los Angeles, CA 90017

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-287

In the Supreme Court

of the

United States

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants,

VS.

LAPIDUS POPCORN, INC.
Appellee.

On Appeal from the Court of Appeal of the State of California after Denial of Review by the Supreme Court of California

REPLY IN SUPPORT OF JURISDICTIONAL STATEMENT-STATE CIVIL CASE

BAKER & MCKENZIE
JUAN G. COLLAS, JR.
JONATHAN S. KITCHEN
Counsel of Record
580 California Street, Suite 500
San Francisco, CA 94104
(415) 576-3000
Counsel for Appellants Granex Corporation, U.S.A. and Pan-Pacific Commodities

PILLSBURY, MADISON & SUTRO
JAMES F. KIRKHAM
WALTER R. ALLAN
Counsel of Record
225 Bush Street
Post Office Box 7880
San Francisco, CA 94120
(415) 983-1000
Counsel for Appellant Crown Oil Corporation

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Preliminary statement	1
Argument	1
I	
The issue raised by the decision below is important and calls for plenary argument	1
II	
The decision below is final under 28 U.S.C. section 1257	2
A. There is no impairment of finality in the procedure by which the constitutional issues were raised below	2
B. Further litigation would be precluded by a holding of unconstitutionality	3
1. Identifiable Federal policies are being undermined by the continuance of litigation in the state courts	4
2. The due process issue is likewise final. Even if it were not, this appeal is proper	6
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

	Page
Clark v. Kansas City (1899) 172 U.S. 334	2
Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469	4, 6
Flynt v. Ohio (1981) 451 U.S. 619	4, 6
Gardner v. Teamsters Union (1953) 346 U.S. 485	5
Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co., (1984) 467 U.S. 622	5
Illinois Brick v. Illinois (1977) 451 U.S. 720	1, 2, 4, 7
McComb v. Commissioners (1876) 91 U.S. 1	2
Meagher v. Minnesota Thresher Mfg. Co. (1892) 145 U.S. 608	2
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc. (1973) 414 U.S. 156	2, 3
Silkwood v. Kerr-McGee Corp. (1984) 464 U.S. 238	5
Sola Electric Co. v. Jefferson Co. (1942) 317 U.S. 173	5
Union Carbide Corp. v. Superior Court (1984) 36 Cal.3d 15, 201 Cal.Rptr. 580, 679 P.2d 14	5

Statute

28 U.S.C. Section 1257	2

No. 86-287

In the Supreme Court

of the

United States

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants,

VS.

LAPIDUS POPCORN, INC.
Appellee.

On Appeal from the Court of Appeal of the State of California after Denial of Review by the Supreme Court of California

REPLY IN SUPPORT OF JURISDICTIONAL STATEMENT-STATE CIVIL CASE

PRELIMINARY STATEMENT

This reply responds to the motion to dismiss appeal submitted by Lapidus Popcorn, Inc. ("Lapidus"), the motion of the State of California ("California"), as amicus curiae, to dismiss or affirm, and the brief of Atlantic Richfield Company, et al. ("Atlantic"), as amicus curiae, in support of the jurisdictional statement.

ARGUMENT

I

THE ISSUE RAISED BY THE DECISION BELOW IS IMPORTANT AND CALLS FOR PLENARY ARGUMENT

In 1978, the California Legislature amended the state antitrust law for the express purpose of assuring that this Court's holding in *Illinois Brick v. Illinois* (1977) 451 U.S. 720—which limits antitrust claims for overcharge damages to direct purchasers—would not be applicable in actions brought in California

state courts. In so doing, California has created the very *risk* of multiple liability that this Court found "unacceptable" (431 U.S. at 731, n. 11; see Jurisdictional Statement, pp. 8-10). In addition, California has impaired the claims of direct purchaser plaintiffs under the federal antitrust laws (see ibid., pp. 10-12), although the encouragement of such claims was one of the purposes of *Illinois Brick* (431 U.S. at 745). The State of California as amicus curiae would have this Court believe that "California's indirect purchaser statute is wholly consistent with Federal law and policy" (California Br., p. 13). However, the California Court of Appeal has declared "that it is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action" (Jurisdictional Statement, p. A9). The California court has thus acknowledged the direct conflict between state and federal law. In doing so, it has set its interpretation of congressional intent above that of this Court, and it has ignored Congress' refusal to alter the *Illinois Brick* decision (see, particularly, Jurisdictional Statement, p. 10, n. 5).

II

THE DECISION BELOW IS FINAL UNDER 28 U.S.C. SECTION 1257

A. There is no impairment of finality in the procedure by which the constitutional issues were raised below

Lapidus asserts that the procedure by which the constitutional question was determined in the California courts precludes review, citing three 19th century opinions of this Court for the proposition that a decision overruling a demurrer necessarily lacks the requisite finality for review by this Court (Lapidus Br., pp. 2-3).[1] But the very case upon which Lapidus relies to articulate the policy and reasoning behind the finality requirement of section 1257, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.* (1973) 414 U.S. 156, involved a state-court

---

[1] *Clark v. Kansas City* (1899) 172 U.S. 334; *Meagher v. Minnesota Thresher Mfg. Co.* (1892) 145 U.S. 608, 610-611; *McComb v. Commissioners* (1876) 91 U.S. 1.

adjudication which likewise was decided "without an evidentiary hearing," and which was remanded by the state appellate court to the trial court to reconsider the merits " '*sans*' the constitutional question" (id. at p. 162). Rejecting the kind of argument Lapidus makes here, this Court held the order final and reviewable, and pointed out that a contrary rule would impose upon the judicial system "a completely unnecessary waste of time and energy" (id. at 160). That same criterion applies with even greater force here. The constitutionality issue is presented squarely on this appeal, and further proceedings below would not clarify the issue now before this Court.[2]

B. Further litigation would be precluded by a holding of unconstitutionality

Lapidus next erroneously suggests that hearing this appeal would result in piecemeal review (Lapidus Br., pp. 4-5), and that it would not preclude further litigation no matter how the appeal is decided (Lapidus Br., pp. 5-7). Both suggestions are false and rest upon non sequiturs. First, Lapidus points out that indirect purchasers under federal law may have both cost-plus claims and claims for injunctive relief, and that such claims cannot be preempted. But that fact emphasizes that this case is particularly appropriate for review, because no cost-plus claims are asserted here, and no injunctive relief is sought. Second, Lapidus asserts that further litigation would not be precluded because, in fact, there is no preemption (viz., "[n]o federal statutory or constitutional policies are being undermined by the prosecution of this indirect-purchaser suit" (Lapidus Br., p. 6)). But that argument addresses the merits of the issue on this appeal and, by addressing

---

[2] Lapidus argued below that, because the constitutionality issue was raised by demurrer, the California courts should avoid reaching the merits. The California courts rejected that argument, and they decided the issue here presented. The Supreme Court of California spoke twice: once to overrule the intermediate appellate court's refusal to address appellants' petition for review on the merits, instructing that court to speak to the merits, and once again to deny review and to let stand the subsequent decision of the appellate court on the merits. The highest court in California thus decided that there were no procedural impediments to consideration of the issue of constitutionality.

the merits, implicitly admits that appellants are correct. The ruling sought by appellants here would, in fact, terminate this litigation.

1. Identifiable Federal policies are being undermined by the continuance of litigation in the state courts

In its brief, California correctly concedes that the preemption issue was the subject of a final decision below.[3] A concession of finality as to the preemption issue disposes of any technical argument as to appealability. This Court has recognized that a state court's final determination of a federal issue is subject to review by appeal if further state court litigation "would seriously erode federal policy" (*Flynt v. Ohio* (1981) 451 U.S. 619, 622) and if "reversal of the state court on the federal issue would be preclusive of any further litigation" (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 482-483).[4] This case also involves the requisite "identifiable federal statutory or constitutional policies which would [be] undermined by the continuation of the litigation in the state courts" (*Flynt v. Ohio,* supra, 451 U.S. 622).

Thus, this appeal fits within the criteria of *Cox* and *Flynt.* In *Flynt*, there had been no determination below that the publication in question was obscene, and this court was "confronted only with a state effort to prosecute an unprotected activity, the dissemination of obscenity" (619 U.S. at p. 622). Here, there is no question that indirect purchasers seek to recover the passed-on portion of the alleged overcharge damages, liability for which the direct purchasers have previously discharged by settlement in federal court. Thus, the risk of double recovery, and the impairment of the claims of antitrust claimants seeking settlements or judgments

---

[3] "Only * * * preemption was, in any sense, the subject of final decision" (California Br., p. 6).

[4] The dissent in *Cox Broadcasting* expressed its concern for "harmonious state-federal relations" and principles of "comity and federalism" (420 U.S. 505). Here, federal-state relations were disrupted, first, by adoption of the 1978 amendment and, second, by the California Court of Appeal which flatly declared that this Court's opinion in *Illinois Brick* is wrong (Jurisdictional Statement, pp. A8-A9).

as to the entire overcharge damages, are real and unavoidable.[5] The federal policy which this Court announced, and which Congress approved, is seriously eroded.[6]

In this connection, the amicus brief of Atlantic, while helpful in showing the multi-state importance of this issue, is in error in suggesting that a different disposition of the California Supreme Court's decision in the *Union Carbide* case (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 201 Cal.Rptr. 580, 679 P.2d 14) could possibly have solved the issue of multiple liability presented by California indirect purchaser claims (Atlantic Br., pp. 8-10). Atlantic's argument assumes that, had the *Union Carbide* case been decided differently, California would have the power to require that direct purchasers injured under federal law, wherever located, be brought before a California court. The State of California has no such power. But absent such power, no procedural device—joinder or otherwise—can avoid the problem of double recovery.

Even if the attempt to avoid double recovery were limited to direct purchasers over which the State of California had jurisdiction, any such procedural device must necessarily require that direct purchasers give up a portion of their claims to which they are entitled under federal law to indirect purchasers. This, we submit, emphasizes precisely why California's indirect purchaser

---

[5] The federal class involved in this case consisted of *all* direct purchasers of coconut oil. The class which Lapidus seeks to represent consists of all California businesses which purchased coconut oil from the direct purchasers.

[6] Lapidus incorrectly argues that the direct purchaser issue is merely one of "remedy" and (citing *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 and *Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co.,* (1984) 467 U.S. 622) that state "remedies" are not subject to preemption (Lapidus Br., pp. 4-5). There is no such rule:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law" (*Gardner v. Teamsters Union* (1953) 346 U.S. 485, 491; accord, *Sola Electric Co. v. Jefferson Co.* (1942) 317 U.S. 173, 176).

claims are preempted and why procedural devices cannot be effective to avoid preemption. The problem is exacerbated by the potential of fifty other rival jurisdictions addressing the same overcharge.

The Atlantic brief, in any event, focuses solely on double recovery, only one of the reasons why indirect purchaser claims are preempted. There are other reasons at least as persuasive if not more so: (1) the impairment of the claims of direct purchasers; (2) the impairment of their motive to bring suit and thus to police compliance with the antitrust laws; (3) the impairment of federal policy in favor of settlement; (4) the reduction of the recovery to direct purchasers in settlements, where the settling parties must necessarily include allocations for state indirect purchasers; and (5) the reintroduction of all the evidentiary complexities and speculations inherent in allocating between direct and indirect purchasers where federal class settlements are presented for approval (see Jurisdictional Statement, pp. 10-12).

In this regard, California argues that "disincentives created by State laws" (California Br., p. 15) are simply a "natural consequence of our Federal system" (Id., p. 16). Inasmuch as this Court has not yet spoken, those disincentives have practical impact everywhere today in private enforcement of the antitrust laws. Judicial economy in the broadest sense, both in this case and as to the many other pending cases in California and other jurisdictions, requires that this issue be decided, and such disincentives be removed once and for all from federal antitrust enforcement. There is no technical impediment to the finality of the decision below for purposes of this appeal; and absent such technical impediment we respectfully submit that it cannot reasonably be urged that the issue is not of sufficient importance to merit plenary consideration.

2. The due process issue is likewise final. Even if it were not, this appeal is proper

Both California and Lapidus argue that "the due process holding [below] is not a final decision" (California Br., p. 3; see Lapidus Br., p. 5). But that is beside the point when, as here, the *Cox* and *Flynt* criteria are met.

Moreover, the argument is circular and misses the point on finality for purposes of this appeal. In holding "the potential for multiple liability in the present case is sheer speculation" (Appx. A-10), the California court stated (in a close paraphrase from the *Illinois Brick* dissent) that it was "confident that when the threat of double liability occurs, the trial court will fashion relief accordingly" (ibid.).[7] In other words, the California court necessarily assumed that, if indirect purchaser claims are allowed, procedural strategies and allocations may possibly prevent double recovery, and thus obviate any due process issue. However, implicit in that assumption is the notion that a state has power to impair the claims of direct purchasers under federal law, since a portion of those claims must necessarily be disallowed in favor of indirect purchasers to avoid the due process issue. The impairment of federal antitrust policy by state indirect purchaser claims cannot be avoided by procedural devices. To restore federal-state harmony, we respectfully submit that this Court should speak now and hold state indirect purchaser statutes preempted.[8]

---

[7] By tolerating the "threat of double liability," the California court took the position that this Court was wrong in *Illinois Brick* when it found such "risk" unacceptable and rejected possible procedural strategies as inadequate.

[8] The California court likewise stated that settlements of antitrust lawsuits do not, for due process purposes, dispose of the damages which may be claimed for the acts upon which those lawsuits are based. The California court reasoned that, notwithstanding a settlement of a federal antitrust action with all direct purchasers, under the due process clause an indirect purchaser in California can litigate the issue of the direct purchaser's damages in state court, and if the direct purchasers would have received more than they settled for, the excess may be extracted from the same defendants for the benefit of indirect purchasers (Appx. A-10). If this reasoning be true, a defendant would be foolish to settle federal direct purchaser claims except with an additional discount deep enough to cover liability to the indirect purchasers. This emphasizes one of the ways state indirect purchaser claims impair the value of federal direct purchaser claims.

CONCLUSION

The constitutionality of California's law allowing indirect purchaser claims is properly here on appeal. The issue is of key importance to antitrust enforcement. We respectfully submit that this Court should note probable jurisdiction and permit plenary briefing and argument.

Dated: October 6, 1986.

Respectfully submitted,

BAKER & MCKENZIE
JUAN G. COLLAS, JR.
JONATHAN S. KITCHEN
Attorneys for Petitioners
Granex Corporation, U.S.A.
and Pan-Pacific Commodities

PILLSBURY, MADISON & SUTRO
JAMES F. KIRKHAM
WALTER R. ALLAN
Attorneys for Petitioner
Crown Oil Corporation

MOTION FILED
SEP 18 1986

(3)

No. 86-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,

Appellants,

—v.—

LAPIDUS POPCORN, INC.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA AFTER DENIAL OF REVIEW BY THE SUPREME COURT OF CALIFORNIA

MOTION OF ATLANTIC RICHFIELD COMPANY, EXXON CORPORATION, MOBIL OIL CORPORATION, SHELL OIL COMPANY, TEXACO INC. AND UNION OIL COMPANY OF CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND PROPOSED BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT

OTIS PRATT PEARSALL
(*Counsel of Record*)
PHILIP H. CURTIS
BRUCE R. KELLY
HUGHES HUBBARD & REED
One Wall Street
New York, New York 10005
(212) 709-7000

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
HOWARD S FREDMAN
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, California 90071
(213) 486-1554

RONALD C. REDCAY
HUGHES HUBBARD & REED
555 South Flower Street, 37th Floor
Los Angeles, California 90071
(213) 489-5140
Attorneys for Amicus Curiae Atlantic Richfield Company

[Additional attorneys' names appear on inside cover.]

33pp

PHILIP K. VERLEGER
DAVID A. DESTINO
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

CHARLES W. MATTHEWS
EXXON CORPORATION
P. O. Box 2180
1895 Exxon Building
Houston, Texas 77001
(713) 656-3366

A. P. LINDEMANN, JR.
EXXON CORPORATION
1251 Avenue of the Americas
New York, New York 10020
(212) 398-2664
Attorneys for Amicus Curiae
Exxon Corporation

ANDREW J. KILCARR
MAUREEN O'BRYON
DONOVAN LEISURE NEWTON
& IRVINE
1850 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 862-4700

CHARLES F. RICE
MOBIL OIL CORPORATION
150 East 42nd Street
New York, New York 10017
(212) 883-4387

THOMAS R. TROWBRIDGE, III
STEPHEN D. HOUCK
DONOVAN LEISURE NEWTON
& IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100
Attorneys for Amicus Curiae
Mobil Oil Corporation

WILLIAM SIMON
WILLIAM R. O'BRIEN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

RAYMOND V. MCCORD
SHELL OIL COMPANY
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001
(713) 241-5875
Attorneys for Amicus Curiae Shell Oil Company

ROBERT D. WILSON
G. KENNETH HANDLEY
TEXACO INC.
2000 Westchester Avenue
White Plains, New York 10650
(914) 253-4468

LESLIE C. RANDALL
TEXACO INC.
10 Universal City Plaza
Suite 1300
Universal City, California 91608
(818) 505-3025

MILTON J. SCHUBIN
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000
Attorneys for Amicus Curiae Texaco Inc.

DARRYL SNIDER
BROBECK, PHLEGER & HARRISON
444 South Flower Street
Suite 4300
Los Angeles, California 90071
(213) 489-4060

GEORGE A. CUMMING, JR.
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower, Suite 2900
San Francisco, California 94105
(415) 442-0900

HAROLD E. ZAHNER
ROBERT G. POTT
UNION OIL COMPANY OF CALIFORNIA
Legal Department
461 South Boyleston
Los Angeles, California 90017
(213) 977-6125
Attorneys for Amicus Curiae Union Oil Company of California

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-287

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES, *Appellants*,

—v.—

LAPIDUS POPCORN, INC., *Appellee*.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA AFTER DENIAL OF REVIEW BY THE SUPREME COURT OF CALIFORNIA

MOTION OF ATLANTIC RICHFIELD COMPANY, EXXON CORPORATION, MOBIL OIL CORPORATION, SHELL OIL COMPANY, TEXACO INC. AND UNION OIL COMPANY OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Atlantic Richfield Company, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc. and Union Oil Company of California move pursuant to Supreme Court Rule 42(1) for leave to file a brief as *amici curiae* in support of the jurisdictional statement in this appeal from the decision of the Court of Appeal of the State of California, *Crown Oil Corp. v. Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986). This motion is made necessary by the refusal of appellee to consent to the filing of the appended brief.

The six *amici* are directly interested in this appeal because they are defendants in two massive actions brought under the challenged California statute. *Amici* are defendants in *California v. Standard Oil Company of California, et al.*, No. 76-2839 (C.D. Cal.) (the "*California* case"), one of five coordinated treble-damage actions now pending in the United States District Court for the Central District of California. (The five cases are collectively known as "MDL 150.") These cases were filed by the attorneys general of five states, including California, on behalf of the states and purported classes consisting of tens of millions of indirect retail purchasers. The states' complaints allege, *inter alia*, that defendants conspired to fix the price of gasoline sold at retail. The six *amici* are also defendants in *Retail Clerks Union Local 648 v. Exxon Corp., et al.*, No. 789-489 (Cal. Sup. Ct. San Francisco Cty.) (the "*Retail Clerks*" case), an action in the state court on behalf of a purported class of indirect purchasers asserting substantially the same claims as those asserted in the *California* case.

The five states' federal action against *amici* has led to a straightforward application of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). With exceptions not material here, *amici* do not sell gasoline directly to consumers at retail. Instead, such consumers purchase gasoline indirectly from some thousands of service station dealers. The direct purchaser dealers brought a class action of their own alleging that the defendant manufacturers had imposed collusive restraints that enabled them to extract a wholesale overcharge from the dealers. In that case, under the rule of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the defendants were barred from attempting to prove that the direct purchaser dealers had passed on the alleged overcharges to indirect purchasers. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). After certification of the *Bogosian* direct purchaser class, the six *amici* and their co-defendants settled the case for an aggregate amount of $36 million. *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985).

California and its co-plaintiff states in MDL 150 argued that *Illinois Brick* did not bar federal antitrust claims based on the plaintiffs' indirect purchases because the dealers were "captives" whose direct wholesale purchases did not constitute a "true intermediate market." The district court, rejecting that argument, denied class certification. The court reasoned that putative consumer class members' claims either were barred outright by the rule of *Illinois Brick*, or would require dealer-by-dealer proof that thousands of dealers were "controlled" by their suppliers within the meaning of a purported exception to *Illinois Brick* or were engaged in vertical price-fixing conspiracies with their respective suppliers. The plaintiff states' proposed consumer classes therefore failed to meet the requirement of Fed. R. Civ. P. 23(b)(3) that common issues predominate over individual issues. A unanimous panel of the Ninth Circuit affirmed this decision, and this Court denied certiorari. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 523 F. Supp. 1116 (C.D. Cal. 1981), *aff'd*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984).

These decisions should have laid to rest the indirect purchase claims in the *California* case, but they have not. California, in addition to pleading its claim under federal law, also pleaded a claim based on the same alleged facts under the California antitrust law that is before the Court in this case. California now contends that this pendent claim permits a renewed attempt to certify a class of indirect purchasers. Moreover, shortly after the district court had denied class certification in the *California* case, three union locals commenced the *Retail Clerks* case against the six *amici* and others in the California Superior Court.

The cases involving the six *amici* further demonstrate that this appeal has implications beyond California. Arizona, a co-plaintiff with California in MDL 150, has pleaded a claim under its state antitrust law. Although the Arizona legislature has not amended the Arizona law to permit indirect purchaser suits, Arizona nevertheless contends that the *Illinois Brick* rule

against indirect purchaser claims does not apply in suits under state law.[1] Moreover, the states of Arizona, Oregon, and Washington have moved for leave to intervene in both the *California* case and the *Retail Clerks* case in the state court. Their proposed complaint in intervention seeks to apply California's Cartwright Act to permit claims by indirect purchasers in other states.

The six *amici* seek leave to file their proposed brief to demonstrate both the broad significance of the preemption issue presented by this appeal and to demonstrate that preemption is clearly required. Preemption is required because of the clear conflict between the California statute subjecting firms, including the six *amici*, to the risk of multiple liability for a single antitrust violation and the federal policy against subjecting firms to such a risk.

Dated: September 18, 1986

Respectfully submitted,

/s/ Otis Pratt Pearsall

OTIS PRATT PEARSALL
(*Counsel of Record*)
PHILIP H. CURTIS
BRUCE R. KELLY
HUGHES HUBBARD & REED
One Wall Street
New York, N.Y. 10005
(212) 709-7000

1. Arizona's position illustrates that the issue raised here involves not only the ten states with statutes explicitly allowing indirect purchaser recovery (*see* Jurisdictional Statement at 13 & 13 n.8), but potentially involves some forty states with state antitrust laws permitting private damage actions. *See* 16L & 16M J. Von Kalinowski, *Antitrust Laws and Trade Regulation* (1986).

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
HOWARD S FREDMAN
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, Cal. 90071
(213) 486-1554

RONALD C. REDCAY
HUGHES HUBBARD & REED
555 South Flower Street,
37th Floor
Los Angeles, Cal. 90071
(213) 489-5140
Attorneys for Amicus Curiae Atlantic Richfield Company

PHILIP K. VERLEGER
DAVID A. DESTINO
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, Cal. 90017
(213) 624-2400

CHARLES W. MATTHEWS
EXXON CORPORATION
P. O. Box 2180
1895 Exxon Building
Houston, Tex. 77001
(713) 656-3366

A. P. LINDEMANN, JR.
EXXON CORPORATION
1251 Avenue of the Americas
New York, N.Y. 10020
(212) 398-2664
Attorneys for Amicus Curiae Exxon Corporation

ANDREW J. KILCARR
MAUREEN O'BRYON
DONOVAN LEISURE NEWTON
& IRVINE
1850 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 862-4700

CHARLES F. RICE
MOBIL OIL CORPORATION
150 East 42nd Street
New York, N.Y. 10017
(212) 883-4387

THOMAS R. TROWBRIDGE, III
STEPHEN D. HOUCK
DONOVAN LEISURE NEWTON
& IRVINE
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 307-4100
Attorneys for Amicus Curiae
Mobil Oil Corporation

WILLIAM SIMON
WILLIAM R. O'BRIEN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

RAYMOND V. MCCORD
SHELL OIL COMPANY
One Shell Plaza
P. O. Box 2463
Houston, Tex. 77001
(713) 241-5875
Attorneys for Amicus Curiae
Shell Oil Company

ROBERT D. WILSON
G. KENNETH HANDLEY
TEXACO INC.
2000 Westchester Avenue
White Plains, N.Y. 10650
(914) 253-4468

LESLIE C. RANDALL
TEXACO INC.
10 Universal City Plaza
Suite 1300
Universal City, Cal. 91608
(818) 505-3025

MILTON J. SCHUBIN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000
Attorneys for Amicus Curiae Texaco Inc.

DARRYL SNIDER
BROBECK, PHLEGER
& HARRISON
444 South Flower Street
Suite 4300
Los Angeles, Cal. 90071
(213) 489-4060

GEORGE A. CUMMING, JR.
BROBECK, PHLEGER
& HARRISON
One Market Plaza
Spear Street Tower, Suite 2900
San Francisco, Cal. 94105
(415) 442-0900

HAROLD E. ZAHNER
ROBERT G. POTT
UNION OIL COMPANY OF
CALIFORNIA
Legal Department
461 South Boyleston
Los Angeles, Cal. 90017
(213) 977-6125
Attorneys for Amicus Curiae Union Oil Company of California

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	2
THE QUESTIONS ARE SUBSTANTIAL	2
I. IT IS FEDERAL ANTITRUST POLICY THAT FIRMS SHALL NOT BE SUBJECT TO THE RISK OF MULTIPLE TREBLE DAMAGES FOR A SINGLE VIOLATION	4
II. THE CALIFORNIA INDIRECT PURCHASER STATUTE CONFLICTS WITH THIS FEDERAL POLICY	8
III. THE CONFLICT BETWEEN STATE LAW AND FEDERAL POLICY REQUIRES PREEMPTION	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	PAGE
Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	6, 7
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	6, 6n
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	2n
Crown Oil Corp. v. Superior Court of San Francisco, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986)	*passim*
Edgar v. MITE Corp., 457 U.S. 624 (1982)	2
Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982)	3n
Flood v. Kuhn, 407 U.S. 258 (1972)	11
Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972)	11n
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	*passim*
Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972)	5, 6
Hayfield Northern Railroad v. Chicago & North Western Transportation Co., 467 U.S. 622 (1984)	12n
Hines v. Davidowitz, 312 U.S. 52 (1941)	2
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	*passim*
In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980)	9n
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 691 F.2d 1335 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984)	9n

PAGE

In re Midwest Milk Monopolization Litigation, 730 F.2d 528 (8th Cir.), *cert. denied*, 105 S. Ct. 306 (1984) 9n

Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc., 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981) 9n

Lawrence County v. Lead-Deadwood School District, 105 S. Ct. 695 (1985) 2n

Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918 (3d Cir. 1986) 9n

McCarty v. McCarty, 453 U.S. 210 (1981) 3n

Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) 7n

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 7

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) 2

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) ... 12n

Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15, 201 Cal. Rptr. 580, 679 P.2d 14 (1984) 9, 9n, 10

Statutes

Cal. Bus. & Prof. Code § 16700 *et seq.* (West 1964 & Supp. 1986) 2n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-287

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,

Appellants,

—v.—

LAPIDUS POPCORN, INC.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA AFTER DENIAL OF REVIEW BY THE SUPREME COURT OF CALIFORNIA

PROPOSED BRIEF OF ATLANTIC RICHFIELD COMPANY, EXXON CORPORATION, MOBIL OIL CORPORATION, SHELL OIL COMPANY, TEXACO INC. AND UNION OIL COMPANY OF CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Atlantic Richfield Company, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California, as *amici curiae*, respectfully urge that if the Court does not summarily reverse the decision below, *Crown Oil Corp. v. Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986), it should note probable jurisdiction in this appeal and set the case for full briefing and argument on the merits.

INTEREST OF THE *AMICI CURIAE*

As explained more fully in the accompanying Motion, the six *amici* are directly interested in this appeal because they are defendants in cases brought under the challenged California statute on behalf of indirect purchasers.[1] Those actions expose the six *amici* to the risk of millions of dollars of potential duplicative liability.

THE QUESTIONS ARE SUBSTANTIAL

It is familiar doctrine that, even absent express or implied preemption of an entire field of regulation, state laws are preempted to the extent that they actually conflict with federal law or policy. Such a conflict arises when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). All that is required to find preemption is that state law "frustrates the objectives of the [federal] Act in some substantial way." *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982) (White, Burger and Blackmun, JJ.). *See Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (quoting *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942)) ("federal policy 'may not be set at naught, or its benefits denied,' by the state law").[2]

---

1. The statute at issue on this appeal is the 1978 amendment to the Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.* (West 1964 & Supp. 1986), quoted in full at Jurisdictional Statement 3-4.

2. The Court has applied this principle repeatedly to hold preempted state laws that conflicted with federal policy. *E.g., Lawrence County v. Lead-Deadwood School District*, 105 S. Ct. 695, 700-03 (1985) (preempting state law governing local governments' disposition of federal payments as conflicting with federal "objective of ensuring local governments the freedom and flexibility to spend money as they saw fit"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704-05 (1984) (preempting a state advertising ban that effectively compelled cable operators to abandon carrying "pay cable" services as conflicting with

(footnote continued on following page)

The California Court of Appeal failed to find that the California statute in this case impermissibly conflicted with federal policy because that court failed to grasp the multiple federal policies established by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).[3] The Court of Appeal concluded that *Illinois Brick* rests upon the single federal policy that judicial economy is best served by eliminating pass-on issues from antitrust trials. Jurisdictional Statement at A-9 & A-9 n.6. The court thereby failed to recognize that *Illinois Brick* also rests upon a federal policy against subjecting a firm to the risk of mutiple liability for a single antitrust violation.[4] Indeed, *Illinois Brick* barred indirect purchaser suits because the majority in that case believed that such a bar is the only foolproof way to prevent multiple liability. 431 U.S. at 730-31 & n.11. It is this federal policy with which the California statute is in direct conflict. That conflict requires preemption here.

(footnote continued from previous page)

federal policy favoring such carriage); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 155-56 (1982) (preempting state law prohibiting "due on sale" clauses in real estate mortgages as conflicting with federal policy of affording savings and loan associations the flexibility to include such clauses); *McCarty v. McCarty*, 453 U.S. 210, 232-35 (1981) (preempting state community property law as conflicting with federal policy that military retirement pay shall be treated as the retiree's personal entitlement).

3. The Court of Appeals also expressed distaste for the result in *Illinois Brick*, stating that this Court's decision had frustrated Congressional intent. Jurisdictional Statement at A-9 & A-9 n.6.

4. In the Court of Appeal's view, exposing defendants to multiple liability in suits by direct and indirect purchasers was merely something that *Illinois Brick* would avoid if possible but does not forbid outright, so that state law indirect purchaser actions are not preempted merely because they may impose multiple liability. Jurisdictional Statement at A-6. (stating that the *Illinois Brick* Court was "troubled by" and "frowned upon" multiple liability).

I.

IT IS FEDERAL ANTITRUST POLICY THAT FIRMS SHALL NOT BE SUBJECT TO THE RISK OF MULTIPLE TREBLE DAMAGES FOR A SINGLE VIOLATION

The California Court of Appeal's failure to recognize the federal policy against multiple liability apparently resulted from its failure to appreciate that the Court's opinion in *Illinois Brick* dealt with two fundamental questions. First, the Court considered whether to permit the inconsistent application of pass-on theories. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487-94 (1968), had held that the direct purchaser was entitled to recover the full amount of the overcharge that he paid and that the defendant could not seek to diminish that recovery by attempting to prove that the direct purchaser passed the overcharge on to indirect purchasers. The threshold issue for the *Illinois Brick* Court was whether it should permit indirect purchasers to recover the portion of the overcharge that is passed on while retaining the *Hanover Shoe* rule precluding a pass-on defense in suits by direct purchasers. The Court rejected that option. Such inconsistent application of pass-on theories would expose defendants to a risk of multiple liability that the Court expressly found to be unacceptable. 431 U.S. at 730-731 & 731 n.11. Second, after having concluded that pass-on rules should be applied consistently, the Court considered whether it should retain the *Hanover Shoe* rule against defensive proof of pass-on. The Court concluded that *Hanover Shoe* had been correctly decided and should not be overruled. Accordingly, the Court held that an indirect purchaser may not recover the portion of the illegal overcharge allegedly passed on to him.

The *Illinois Brick* Court's holding that pass-on theories may not be used inconsistently in suits by direct and indirect purchasers rested upon, and clearly expressed, a federal antitrust policy against exposing defendants to the risk of multiple liability. The Court's opinion states that multiple liability

would be "unwarranted," 431 U.S. at 730, and "not *** acceptable," 431 U.S. at 731 n.11. The Court cited *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972), which rejected *parens patriae* antitrust suits for injury to a state's "general economy" on the ground, *inter alia*, that any damages awarded to the state for such injury would duplicate damages recoverable by other plaintiffs. 431 U.S. at 731.

The *Illinois Brick* majority and dissenting opinions agreed that multiple liability should not be imposed. They differed only on whether the policy against multiple liability required preclusion of indirect purchaser suits. The three dissenting Justices found that procedural mechanisms such as consolidation and statutory interpleader would prevent multiple liability in most cases. The dissenting opinion acknowledged that such devices might not always prevent multiple liability, but found on policy grounds that "the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not *** justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery." 431 U.S. at 761 (Brennan, J., dissenting). The majority, however, disagreed. After noting the available procedural options the Court concluded that there would always be some cases in which such procedural devices would not prevent multiple liability. The Court concluded that advocates of indirect purchaser suits "ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. ****We do not find this risk acceptable.*" 431 U.S. at 731 n.11 (citations and quotations omitted; emphasis added).

Other opinions of the Court have articulated this federal policy against the risk of multiple liability for a single antitrust violation. As noted above, *Hawaii v. Standard Oil Co. of California* had announced the policy prior to *Illinois Brick*. And since *Illinois Brick* the Court has adverted to the policy repeatedly. In 1979 the Court stated that "[a] central premise of our holding in *Hawaii* was concern over duplicative recov-

eries." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). In 1982, the Court noted that *Illinois Brick* had "found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474 (1982). The Court also stated that both *Hawaii* and *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws."[5] *Id.* at 474-75. And in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court referred to "the policy against duplicative recoveries", *id.* at 545 n.52, and held that the plaintiff union lacked antitrust standing, because, *inter alia*, its claimed injuries might duplicate those of other potential plaintiffs. *Id.* at 543-46. Justice Marshall's dissenting opinion, while disagreeing that the recovery sought by that plaintiff would have been duplicative on the facts, expressly acknowledged the federal policy forbidding multiple liability:

> "Nor does the present case implicate the consideration of statutory policy underlying this Court's decisions in *Illinois Brick Co. v. Illinois* *** and *Hawaii v. Standard Oil Co.* *** Critical to the denial of standing in those cases was the risk of duplicative recovery that would have been created by affording the plaintiffs standing."

Id. at 549-50 (Marshall, J., dissenting) (citations and footnotes omitted). Then, after describing the holdings of *Hanover Shoe* and *Illinois Brick*, Justice Marshall added this explanatory footnote:

> "Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii*

---

5. *McCready* states that *Illinois Brick's* concern over judicial economy, which the Court of Appeal in this case characterized as *Illinois Brick's* principal rationale, Jurisdictional Statement at A-9 & A-9 n.6, was in fact only a "subordinate theme." *McCready* at 475 n.11.

> *v. Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. *Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated.* See 2 P. Areeda & D. Turner, Antitrust Law § 337d (1978)."

Id. at 550 n.7 (Marshall, J., dissenting) (emphasis added).

The Court's concern over double recovery is well founded. The availability of treble damages and attorneys' fees makes the antitrust damage action one of the most potent weapons that a private plaintiff can wield. It is not without its potential for abuse. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). A judicial construction—or, as in this case, a state statute—permitting double recovery turns the action into one for "sextuple damages" and can only exacerbate that potential for abuse.[6]

---

6. One lower court, in rejecting "umbrella" claims by plaintiffs who dealt with non-conspiring competitors of an alleged antitrust violator, noted that imposing excessive liability on antitrust defendants can harm competition:

> "Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits ***. Notwithstanding the seriousness of the *per se* violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws. In this regard, it should be noted that Congress has enacted relatively stiff criminal penalties to punish those who flout the antitrust laws, that the Supreme Court has been especially reticent in sanctioning multiple treble damage recoveries for the same injury, and that other courts have been wary of permitting overkill recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition."

Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 586-87 (3d Cir. 1979) (footnotes omitted).

II.

THE CALIFORNIA INDIRECT PURCHASER STATUTE CONFLICTS WITH THIS FEDERAL POLICY

The California statute permitting suits by indirect purchasers conflicts with the federal policy against multiple liability in every case involving direct and indirect purchasers that is subject to concurrent federal and state antitrust jurisdiction.[7] Under *Hanover Shoe* the direct purchaser can recover in federal court the full amount of the overcharge even where the defendant or an indirect purchaser could prove that some or all of the overcharge was passed on. As a result, any amount recovered by indirect purchasers under California law (which depending on the facts could be the entire overcharge, or even several times the amount of the overcharge if successive levels of indirect purchasers bring suit), will by definition represent multiple liability.

Moreover, the California courts have exacerbated the risk of multiple liability by rejecting the only measure that even theoretically could have avoided the risk—requiring the direct purchaser to be joined as a defendant in the indirect purchaser's suit. In such a case, the direct purchaser could be forced to pursue a state antitrust law claim in which he could recover only the amount not passed on. The court could adjudicate both the amount of the unlawful overcharge that the direct purchaser paid and the amount that was passed on to each succeeding indirect purchaser. Both direct and indirect purchasers would be bound by the resulting judgment, which

---

7. California's law permitting indirect purchasers to sue is not in conflict with federal law insofar as it is applied in cases based on wholly intrastate commerce not subject to the federal antitrust laws. But this is not such a case: a class of direct purchasers sued and recovered under the federal antitrust laws for the same alleged violations. Jurisdictional Statement at 5-6. A similar result occurred in the cases involving the six *amici*. *See* accompanying Motion p.2.

would limit the defendant's liability, as federal policy requires, to three times the amount of the original overcharge.[8]

However, the California Supreme Court has rejected this approach. In *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 22-24, 201 Cal. Rptr. 580, 584-86, 679 P.2d 14, 18-20 (1984), the California Supreme Court held that direct purchasers are not indispensable parties who must be joined in indirect purchaser suits in order to prevent the risk of multiple liability.[9] The court found (over a vigorous dissent) that the risk of multiple liability was not substantial.

Union Carbide's finding that the risk of multiple liability did not require joinder of direct purchasers is unsound. The court concluded that defendants are not exposed to multiple liability

---

8. In an analogous context, lower federal courts have held that where an indirect purchaser sues on the theory that the direct purchaser was a participant in a vertical price-fixing conspiracy (rather than on a pass-on theory directly controlled by *Illinois Brick*), the federal policy against duplicative recovery requires that the direct purchaser be joined in the action and bound by its result. If the direct purchaser were not joined in such a case, double recovery could occur if he later sued for the full overcharge that he paid, while defending any claim that he participated in a vertical conspiracy and relying on *Hanover Shoe* to bar any pass-on defense. *See Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 931-32 (3d Cir. 1986); *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528, 529-32 (8th Cir.), *cert. denied*, 105 S. Ct. 306 (1984); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *see also Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 977 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981).

9. While the *Union Carbide* court left open the possibility that *intermediate* purchasers down the chain of distribution from the direct purchasers might be indispensable parties on a proper factual record, 36 Cal. 3d at 23-24, 201 Cal. Rptr. at 585-86, 679 P.2d at 19-20, it definitively held that the *direct* purchaser's ability to recover the entire overcharge under *Hanover Shoe* did not make him indispensable to the indirect purchaser's state antitrust lawsuit. 36 Cal. 3d at 22-23, 201 Cal. Rptr. at 584-85, 679 P.2d at 18-19.

so long as they are paying damages to different plaintiffs (i.e., direct purchasers in federal court and indirect purchasers in state court) for the same tortious conduct. 36 Cal. 3d at 22-23, 201 Cal. Rptr. at 584-85, 679 P.2d at 18-19. That is obviously false in a case such as *Union Carbide* where both the direct and indirect purchasers sued based on the same alleged price-fixing. 36 Cal. 3d at 20, 201 Cal. Rptr. at 583, 679 P.2d at 17. The only tortious conduct committed by a defendant in such a case is the extraction of a wholesale overcharge from the direct purchaser. *Hanover Shoe* requires the defendant to pay that full overcharge, trebled, to the direct purchaser under federal law. Any amounts paid in such a case under state law to indirect purchasers (who by definition are not victims of some separate tort by the defendant because the defendant never dealt with them) represents multiple liability.

Union Carbide's conclusion that the California legislature has adopted the views of the *Illinois Brick* dissenting opinion overlooks the statements in that dissenting opinion disapproving of multiple liability and recommending that indirect purchaser suits be accompanied by appropriate procedural mechanisms to prevent it. 36 Cal. 3d at 20, 24, 201 Cal. Rptr. at 582, 585, 679 P.2d at 16-17, 19. By rejecting such a procedural mechanism, *Union Carbide* ensured that California law will impose multiple liability that not even the dissenting opinion in *Illinois Brick* advocated.[10]

---

10. Even if the California Supreme Court had decided *Union Carbide* differently, California's indirect purchaser law would still conflict with federal policy, because this Court concluded in *Illinois Brick* that efforts to bring direct and indirect purchasers together in one action, while desirable in theory, would not adequately protect against the risk of multiple liability that indirect purchaser suits would present. 431 U.S. at 731 n.11, 737 n.18.

III.

THE CONFLICT BETWEEN STATE LAW AND FEDERAL POLICY REQUIRES PREEMPTION

The state law at issue on this appeal clearly conflicts with federal policy because the state law creates the very risk of multiple liability that the *Illinois Brick* majority found "unwarranted" and "not acceptable." This conflict is all that is required for preemption under the Court's opinions cited at p. 2 and n.2, *supra*. Indeed, the Court previously has held preempted state antitrust laws where their application "would conflict with federal policy." *Flood v. Kuhn*, 407 U.S. 258, 284 (1972). The Court's principal decision in *Flood* was to adhere to its prior decisions holding professional baseball exempt from the federal antitrust laws. But that holding did not dispose of Flood's attempt to fill the vacuum by applying state antitrust law to baseball. The Court held that the statements by the lower courts, including the trial court's statement that state antitrust regulation would conflict with federal policy, "adequately disposed of" Flood's attempt to apply state antitrust laws to baseball, and thereby held that state antitrust laws could not be so used where such use would conflict with federal policy.[11] Similarly, the California statute cannot be used

---

11. The *Flood* district court initially ruled that federal antitrust laws preempted purported state law antitrust regulation of baseball and also that application of state antitrust laws to that sport would impermissibly burden interstate commerce. *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972). It reasoned that state antitrust laws could not regulate baseball when federal policy exempted baseball from antitrust regulation. It described the conflict as follows:

> "Enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball."

316 F. Supp. at 279. The Second Circuit, relying entirely on Commerce Clause grounds, affirmed. 443 F.2d at 266-68. As indicated by the language quoted in the text, the Supreme Court rested its decision on both preemption and Commerce Clause grounds.

to fill a vacuum created by the Court's *Illinois Brick* decision where that use would conflict with federal policy, as articulated by this Court.

In the present case the California Court of Appeal, apart from its failure to discern the clear federal policy against multiple liability articulated in *Illinois Brick*, offered two arguments as to why California's law is not in conflict with federal law. Neither argument can withstand analysis. First, the court analogized California's indirect purchaser statute to the state remedies that were held not preempted in the *Silkwood* and *Hayfield* cases because they were cumulative of federal remedies, but not in conflict with any federal policy.[12] Jurisdictional Statement at A7-8 & A8 n.5. That analogy is incorrect because this Court in *Illinois Brick* was not indifferent on the issue of whether further antitrust liability could be imposed on defendants already liable under *Hanover Shoe* for the full overcharge in suits by the direct purchasers. Rather, this Court held that federal policy required that defendants not be exposed to the risk of such multiple liability. *See* pp. 4-6 above.

Second, the Court of Appeal tried to obfuscate the multiple liability that inevitably must occur if the plaintiffs recover damages in this case by suggesting that the prior direct purchaser action did not result in liability because it was termi-

---

12. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), held that an award of punitive damages under state law in a tort action arising from the alleged unsafe operation of a federally licensed plutonium plant was not in conflict with, and hence not preempted by, the federal statutes and regulations, enforceable by fines, that governed the plant's operation. *Hayfield Northern Railroad v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), held that the provisions of the Staggers Rail Act permitting a carrier to abandon a rail line after providing shippers with an opportunity to subsidize or purchase the line did not preempt a proceeding under state law in which a shipper sought to condemn the line after the carrier had abandoned it. The Court found that, because the state condemnation followed the abandonment of the line, the railroad was not deprived of the opportunity for prompt abandonment which was all that the federal statute had been designed to achieve.

nated by settlement. Jurisdictional Statement at A-10. That is sophistry. The defendants in this case paid the class of all direct purchasers consideration amounting to $12 million to settle their claims for alleged unlawful overcharges. Jurisdictional Statement at A-2 n.2. In settling the case both sides presumably were guided by the knowledge that *Hanover Shoe* would bar any pass-on defense at trial. Thus, for analytical purposes the defendants have paid the entire overcharge because they have settled a litigation in which the entire overcharge was at stake. Indeed, *Illinois Brick* notes that any recovery by an indirect purchaser after the defendant has settled with the direct purchaser would be duplicative recovery. 431 U.S. at 731 n.11.

CONCLUSION

If the decision of the California Court of Appeal is not summarily reversed, the Court should note probable jurisdiction and set this case for full briefing and argument on the merits.

Dated: September 18, 1986

Respectfully submitted,

OTIS PRATT PEARSALL
(*Counsel of Record*)
PHILIP H. CURTIS
BRUCE R. KELLY
HUGHES HUBBARD & REED
One Wall Street
New York, N.Y. 10005
(212) 709-7000

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
HOWARD S FREDMAN
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, Cal. 90071
(213) 486-1554

RONALD C. REDCAY
HUGHES HUBBARD & REED
555 South Flower Street,
37th Floor
Los Angeles, Cal. 90071
(213) 489-5140
Attorneys for Amicus Curiae
Atlantic Richfield Company

PHILIP K. VERLEGER
DAVID A. DESTINO
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, Cal. 90017
(213) 624-2400

CHARLES W. MATTHEWS
EXXON CORPORATION
P. O. Box 2180
1895 Exxon Building
Houston, Tex. 77001
(713) 656-3366

A. P. LINDEMANN, JR.
EXXON CORPORATION
1251 Avenue of the Americas
New York, N.Y. 10020
(212) 398-2664
Attorneys for Amicus Curiae
Exxon Corporation

ANDREW J. KILCARR
MAUREEN O'BRYON
DONOVAN LEISURE NEWTON
& IRVINE
1850 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 862-4700

CHARLES F. RICE
MOBIL OIL CORPORATION
150 East 42nd Street
New York, N.Y. 10017
(212) 883-4387

THOMAS R. TROWBRIDGE, III
STEPHEN D. HOUCK
DONOVAN LEISURE NEWTON
& IRVINE
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 307-4100
Attorneys for Amicus Curiae
Mobil Oil Corporation

WILLIAM SIMON
WILLIAM R. O'BRIEN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

RAYMOND V. MCCORD
SHELL OIL COMPANY
One Shell Plaza
P. O. Box 2463
Houston, Tex. 77001
(713) 241-5875
Attorneys for Amicus Curiae Shell Oil Company

ROBERT D. WILSON
G. KENNETH HANDLEY
TEXACO INC.
2000 Westchester Avenue
White Plains, N.Y. 10650
(914) 253-4468

LESLIE C. RANDALL
TEXACO INC.
10 Universal City Plaza
Suite 1300
Universal City, Cal. 91608
(818) 505-3025

MILTON J. SCHUBIN
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, N.Y. 10022
(212) 407-8000
Attorneys for Amicus Curiae Texaco Inc.

DARRYL SNIDER
BROBECK, PHLEGER
& HARRISON
444 South Flower Street
Suite 4300
Los Angeles, Cal. 90071
(213) 489-4060

GEORGE A. CUMMING, JR.
BROBECK, PHLEGER
& HARRISON
One Market Plaza
Spear Street Tower, Suite 2900
San Francisco, Cal. 94105
(415) 442-0900

HAROLD E. ZAHNER
ROBERT G. POTT
UNION OIL COMPANY OF
CALIFORNIA
Legal Department
461 South Boyleston
Los Angeles, Cal. 90017
(213) 977-6125
Attorneys for Amicus Curiae
Union Oil Company of
California